Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	WC Docket No. 07-245
	)	
Implementation of Section 224 of the Act;	)	GN Docket No. 09-51
A National Broadband Plan for Our Future	)	
	)	
	)	
	)	

COMMENTS OF THE FLORIDA INVESTOR-OWNED ELECTRIC UTILITIES:

Florida Power & Light Co.
Tampa Electric Co.
Progress Energy Florida, Inc.
Gulf Power Co.
Florida Public Utilities Co.

COUNSEL FOR THE FLORIDA IOUS:

Eric B. Langley
Millicent W. Ronnlund
Balch & Bingham LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203

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Florida Power & Light Company ("FPL"), Tampa Electric Company ("TECO"), Progress Energy Florida, Inc. ("PEF"), Gulf Power Company ("Gulf"), and Florida Public Utilities Company ("FPU") (collectively, the "Florida IOUs") respectfully submit these comments concerning certain portions of the Further Notice of Proposed Rulemaking in the above-referenced docket.[1]

I. SUMMARY AND INTRODUCTION

A. Summary of Comments

The FNPRM proposes sweeping changes to existing pole attachment regulation in order to "speed the availability of broadband by making it easier and less expensive for telecommunications and cable companies to use existing infrastructure."[2] This objective presumes that pole attachment policy and practices have somehow suppressed the deployment of broadband and other communications services. This premise not only is at odds with the experience of the Florida IOUs, but also is at odds with the record evidence in this proceeding. Moreover, as acknowledged in the National Broadband Plan, "a reformed FCC regime would apply to only 49 million of the nation's 134 million poles."[3] The Commission's existing pole attachment policy already is quantitatively and qualitatively attacher-friendly to an overwhelming extent. The proposed rules, on the whole, would swing the pendulum further and

[1] Order and Further Notice of Proposed Rulemaking, FCC 10-84 (Released May 20, 2010) ("Order & FNPRM"). The FNPRM was published separately from the Order in the Federal Register (75 Fed. Reg. 41,338 (July 15, 2010), as corrected 75 Fed. Reg. 45,590 (Aug. 3, 2010)). The Order was published as a Declaratory Ruling (75 Fed. Reg. 45,494 (Aug. 3, 2010)). For ease of reference, these comments will provide citations to the paragraph numbers as they appear in the May 20, 2010 Order & FNPRM.

[2] FNPRM, ¶ 20.

[3] FCC, Connecting America: National Broadband Plan, at 130 (Mar. 2010), *available at* www.broadband.gov. The portion of these 49 million poles owned by electric utilities are more likely to be in urbanized areas with multiple broadband providers.

impermissibly in the direction of favoring communications attachers at the expense of electric utilities and their customers. Most of the Commission's proposed rules are based on recommendations from Chapter 6 (Infrastructure) of the National Broadband Plan. The Florida IOUs respectfully believe this is a flawed starting point in light of the fact that Chapter 6 failed to mention – let alone address or balance – any of the concerns raised by electric utilities. This is not an appropriate foundation for reasoned agency decisionmaking.

1. Broadband in Florida

According to Connect Florida, an advocacy group dedicated to improving broadband availability and adoption in the state of Florida, 99.8% of Florida households have access to either terrestrial fixed broadband service or mobile broadband service.[4] In the Sixth Broadband Deployment Report, the Commission identified only five of sixty-seven Florida counties as containing "unserved" areas.[5] The Florida IOUs each have multiple broadband providers in their service territories, with most parts of their service territories served by redundant wireline

[4] Connect Florida, http://connect-florida.org/mapping/interactive_map.php (Interactive Map) (2010).

[5] *Inquiry Concerning the Deployment of Advanced Telecomm. Capability to All Ams. in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomm. Act of 1996, as Amended by the Broadband Data Improvement Act; A Nat'l Broadband Plan for Our Future*, FCC 10-129, GN Docket Nos. 09-137 & 09-51 (July 20, 2010), at App. C ("Sixth Report"). The Sixth Report identifies Calhoun, Gilchrist, Hamilton, Lafayette and Liberty counties as containing unserved areas. Though PEF and FPU collectively own *some* distribution poles in these counties, these counties are mostly served by electric cooperatives and municipally-owned electric systems. Declaration of Scott Freeburn ¶ 12 (attached as Exhibit A); Declaration of Mark Cutshaw ¶ 9 (attached as Exhibit B). As the Florida IOUs and other electric utilities have repeatedly noted, the unserved and underserved areas are almost exclusively rural. If investor-owned electric utilities own poles in these areas at all, those poles typically require no make-ready prior to attachment. The areas where make-ready is costly and complicated are highly urban areas, which are typically served by multiple broadband providers. In short, investor-owned electric utilities – particularly the Florida IOUs, which serve the most populated areas in the nation's second largest state – are not the problem with broadband deployment.

providers, with overlapping wireless broadband service in many of those areas.[6] Broadband deployment has *not* been a problem in Florida. To the extent there are unserved areas in the state, those areas are either (a) outside the service territories of the Florida IOUs, or (b) simply neglected by providers because there are too few customers per mile to justify the investment. For all it appears, pole attachment policy and practices have *facilitated*, rather than impeded, broadband deployment in Florida. There is no evidence to the contrary.

There is significant evidence, though, regarding the impact of pole attachment policy and practices on the safety and reliability of Florida's electric infrastructure. Safety and reliability are paramount for all electric utilities. But Florida's unique vulnerability to massive forces of nature, combined with its dense population, means safety and reliability is even more important to the Florida IOUs. As explained in more detail in the Florida IOUs' initial comments, the Florida Public Service Commission ("FPSC") undertook a multi-prong inquiry into electric infrastructure safety and reliability following the extraordinary 2004 and 2005 hurricane seasons. In at least two of its Orders leading to the eventual rulemaking, the FPSC specifically noted the impact of third-party attachments on electric infrastructure.[7] The final rules adopted by the FPSC include a requirement that each of the Florida IOUs submit a Storm Hardening Plan every three years that contains "a detailed description of the construction standards, policies, practices, and procedures employed to enhance the reliability of overhead and underground electrical

[6] Declaration of Thomas J. Kennedy, P.E. ¶¶ 4-5 (attached as Exhibit C); Declaration of Eric L. O'Brien ¶ 4 (attached as Exhibit D); Declaration of Ben A. Bowen ¶¶ 4-5 (attached as Exhibit E).

[7] Order No. PSC-06-0144-PPA-EI, FPSC Docket No. 060078-EI (Feb. 27, 2006), at 5; Order No PSC-06-0351-PAA-EI, FPSC docket No. 060198-EI (April 25, 2006), at 4.

transmission and distribution facilities in conformance with the provisions of this rule."[8] The rule also specifically provides:

> Attachment Standards and Procedures: As part of its storm hardening plan, each utility shall maintain written safety, reliability, pole loading capacity, and engineering standards and procedures for attachments by others to the utility's electric transmission and distribution poles (Attachment Standards and Procedures). The Attachment Standards and Procedures shall meet or exceed the edition of the National Electrical Safety Code (ANSI C-2) that is applicable pursuant to Rule 25-6.034(2) F.A.C. so as to assure, as far as is reasonably practicable, that third-party facilities attached to electric transmission and distribution poles do not impair electric safety, adequacy, or pole reliability; do not exceed pole loading capacity; and are constructed, installed, maintained and operated in accordance with generally accepted engineering practices for the utility's service territory.[9]

This is precisely the purpose of the Florida IOUs' third-party attachment standards and procedures. Most of what the Commission characterizes innocuously as "access" issues are, from the Florida IOUs' perspective, potentially core safety and reliability issues.

The Florida IOUs' primary concerns in this rulemaking are proposals that might weaken their control over their own infrastructure or compromise electric distribution system safety and reliability. The Florida IOUs are appreciative of the Commission's attention to these issues, and the deference the Commission intends to give electric utilities on critical judgments regarding electric system safety, reliability and engineering.[10] The Florida IOUs also recognize that some of the Commission's proposals are either (a) reflective of widely-used, existing practices, or (b) designed to address issues raised by electric utilities. On the whole, though, the Commission's proposals would make a difficult situation worse.

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[8] Fla. Admin. Code, Rule 25-06 0342(3).

[9] *Id.*, Rule 25-06 0342(5).

[10] *See, e.g.,* FNPRM, ¶ 67.

These comments are divided into three sections addressing (1) the proposed access rules; (2) the proposed revisions to the enforcement process; and (3) the proposed new telecom rate. In addition to sharing data, testimony and positions relating to these issues, the Florida IOUs – where possible – are also offering alternative solutions (concepts and language revisions).

2. Summary of Comments on Proposed Access Rules

There are significant questions regarding the Commission's legal authority to impose many of the proposed access rules. Even setting this legal problem aside, there are significant operational problems with several aspects of the proposed rules. Given the lack of actual data to support a *need* for major access reform, as compared to the significant safety and reliability stakes, the Florida IOUs urge the Commission to use *extreme* caution in adopting new access rules which empower attachers and weaken an electric utility's control over electric system safety and reliability. As the Commission noted, electric utilities "are typically disinterested parties with only the best interest of the infrastructure at heart," while "communications attachers wish to roll out service as quickly as possible, and consequently do not have the same incentives to maintain the safety and reliability of the infrastructure as utilities themselves."[11]

The FNPRM proposes a five-stage access timeline for new attachments.[12] While certain aspects of the proposed timeline are tolerable, other aspects (namely the unclear scope of the make-ready work contemplated by the timeline) are unacceptable, ripe for abuse, and would exceed the Commission's statutory authority. The FNPRM also proposes a new rule regarding use of outside contractors which – if the Florida IOUs understand correctly – is largely reflective of current practices. The proposal to "stage" make-ready payments, on the other hand, is neither economically sensible nor reflective of current practice. In fact, the proposed "staged" payments

[11] FNPRM, ¶¶ 67 & 68.

[12] *Id.*, ¶¶ 31-45.

might actually *delay* make-ready (contrary to the Commission's stated intent). The FNPRM also seeks comment on the options for improving availability of infrastructure data. Though there are sophisticated software platforms that can track as-built, pole-by-pole data, this type of data is expensive to develop and maintain, unnecessary for an electric utility's core business, and still cannot supplant an actual field review of potential deployment routes.

3. Summary of Comments on Proposed Revisions to Enforcement Process

The FNPRM inquires about possible changes to the pole attachment dispute resolution process.[13] Significant changes to the dispute resolution procedures are unwarranted. Optimizing the efficiencies in the existing process will achieve the Commission's intended result; under the Commission's existing rules, an issue can be ripe for decision 30 days after the filing of a complaint. The FNPRM also proposes a radical expansion of the Commission's damage-assessing authority in complaint proceedings. These changes – none of which were specifically sought by attachers in the underlying proceedings and all of which exceed the Commission's statutory authority – would encourage game-playing by attaching entities and create unpredictable economic contingencies for electric utilities and their customers. The FNPRM renews the Commission's inquiry into the problem of unauthorized attachments. The best solution to the problem of unauthorized attachments is to allow electric utilities to enforce contractual provisions specifically designed to deter unauthorized attachments. The FNPRM also proposes limitations on the "sign and sue" rule in the form of a notice requirement. This is a step in the right direction, but requires further revisions in order to promote predictability and fairness, and to prevent attachers from abusing the rule by hiding notice deep within the bowels of a negotiation.

[13] *Id.*, ¶¶ 78-80.

4. Summary of Comments Regarding Proposed New Telecom Rate

The FNPRM proposes to "reinterpret" the telecom rate in a way that does disservice to the language of the Pole Attachment Act, Congressional intent, basic ratemaking principles, more than a decade of the Commission's own precedent, accounting principles, and common sense. Expressed in legal terms, the Commission's proposal not only is contrary to the plain language of the statute, but also would constitute arbitrary and capricious agency decision-making. The FNPRM also asks commenters to "refresh the record…regarding regulation of rates paid by incumbent LECs."[14] To this end, the Florida IOUs adopt and incorporate their earlier comments and submissions which explain why including ILECs as "attachers" with section 224 rights is neither legally permissible nor practically justifiable.

B. The Parties

The Florida IOUs are the five investor-owned electric utilities in Florida. As regulated electric utilities, their core mission is the provision of safe and reliable electric service to customers. Florida is the second largest state (by population) subject to the Commission's pole attachment jurisdiction. For this reason, any rules imposed by the Commission disproportionately impact the Florida IOUs as compared to investor-owned electric utilities in other states. Each of the Florida IOUs owns a significant number of electric distribution poles. The Florida IOUs (with the exception of FPU) have participated in the underlying dockets prior to the release of the FNPRM in various ways, including the filing of comments and evidence and participation in the *ex parte* process (through written submissions and meetings), and hereby adopt and incorporate those submissions as if fully set forth herein.[15]

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[14] FNPRM, ¶ 143.

[15] *See, e.g.,* Initial Comments of Florida Power & Light and Tampa Electric Regarding ILECs and Pole Attachment Rates, WC Docket No. 07-245 (Mar. 7, 2008); Initial Comments of

1. FPL

FPL's principal offices are in Juno Beach, Florida.[16] Its service territory contains approximately 27,650 square miles, covering the entire east coast of Florida, as well as certain parts of Florida's west coast south of Tampa.[17] Major cities within FPL's service territory include Miami, Miami Beach, Ft. Lauderdale, Boca Raton, West Palm Beach, Daytona Beach, Sarasota and Naples.[18] FPL serves approximately 4.5 million customers in 35 counties, and owns more than l.l million distribution poles. More than 790,000 of these poles are impacted by third party attachments.[19]

2. TECO

TECO, headquartered in Tampa, Florida, has supplied the Tampa Bay area with electricity since 1899.[20] TECO's service area covers 2,000 square miles, including all of

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Florida Power & Light, Tampa Electric, and Progress Energy Florida Regarding Safety and Reliability, WC Docket No. 07-245 (Mar. 7, 2008); Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, WC Docket No. 07-245 (Mar. 7, 2008); Reply Comments of Florida Power & Light, Tampa Electric, and Progress Energy Florida, WC Docket No. 07-245 (Apr. 22, 2008); Reply Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, WC Docket No. 07-245 (Apr. 22, 2008). The Florida IOUs have participated in numerous *ex parte* meetings with Commissioners and staff. *See generally ex parte* notices filed in WC Docket 07-245. The Florida IOUs also submitted at least two lengthy, substantive letters responding to specific issues raised by other participants in the underlying proceedings. *See, e.g.,* Letter from Eric. B Langley and J. Russell Campbell to Marlene H. Dortch, WC Docket No. 07-245 (Nov. 20, 2008); Letter from Eric B. Langley and J. Russell Campbell to Marlene H. Dortch, WC Docket No. 07-245 (Apr. 13, 2009). FPL, PEF and Gulf are also participating in this docket through their parent companies in the "Alliance for Fair Pole Attachment Rules" (represented by Hunton & Williams).

[16] Kennedy Decl. at ¶ 2.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] O'Brien Decl. at ¶ 2.

Hillsborough County and parts of Polk, Pasco and Pinellas Counties.[21] TECO serves nearly 670,000 residential, commercial and industrial customers.[22] TECO has approximately 307,000 distribution poles, more than 204,000 of which are impacted by third party attachments.[23]

3. PEF

PEF (also known as Florida Power Corporation) is headquartered in St. Petersburg, Florida.[24] Its service territory covers more than 20,000 square miles in 35 counties in Florida, ranging from the Georgia/Florida border to Central Florida.[25] Some of the major cities and areas within PEF's service territory include St. Petersburg, Clearwater, and the north Orlando area. PEF serves more than 1.7 million customers and owns approximately 1.1 million distribution poles.[26] More than 510,000 of these poles are impacted by one or more third party attachments.[27]

4. Gulf

Gulf is headquartered in Pensacola, Florida.[28] Gulf's service territory covers 7,400 square miles in 71 towns and communities in northwest Florida.[29] Some of the major cities and areas in Gulf's service territory are Pensacola, Ft. Walton Beach, Destin and Panama City.[30]

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Freeburn Decl. at ¶ 2.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Bowen Decl. at ¶ 2.

[29] *Id.*

[30] *Id.*

Gulf serves 428,154 customers in 10 counties and owns 251,099 distribution poles.[31] Of these poles, 150,723 are impacted by third party attachments.[32]

5. FPU

FPU, a wholly owned subsidiary of Chesapeake Utilities Corporation, is an electric and natural gas utility with Florida operations headquartered in West Palm Beach, Florida.[33] FPU's electric operations are based in Northeast Florida (Fernandina Beach) and Northwest Florida (Marianna).[34] FPU serves 30,916 electric customers in four counties, and its electric service territory covers approximately 335 square miles.[35] FPU owns approximately 28,000 distribution poles, which collectively host approximately 14,000 third party attachments.[36]

II. COMMENTS ON PROPOSED ACCESS RULES

A. There are Fundamental and Insurmountable Problems With the Proposed Access Rules

The FNPRM proposes several new access rules in keeping with the Commission's intent "to rely in part on new, broadly applicable rules to ensure that terms and conditions of access to pole attachments are just, reasonable, and nondiscriminatory."[37] Though certain aspects of the proposed rules are acceptable to the Florida IOUs, there are at least three fundamental and insurmountable problems with the Commission's proposed approach in addition to (1) the Commission's inaccurate presumption that make-ready on electric utility poles is an impediment

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[31] *Id.*

[32] *Id.*

[33] Cutshaw Decl. at ¶ 3.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] FNPRM, ¶ 22.

to broadband deployment, and (2) the questionable presumption of legal authority to enact such rules.

First, access issues are inherently fact-intensive – a point the Commission specifically acknowledged in the FNPRM.[38] For this reason, any rules of general applicability are likely to be swallowed by the necessary exceptions. The Commission's underlying premise – that the existing *ad hoc* enforcement process does not work –is not supported by history. But even assuming there was truth to this premise, it could be remedied by either (a) tweaking the enforcement process (rather than attempting to supplant it with broadly applicable rules), or (b) maximizing the existing capabilities of the enforcement process.[39] Under the Commission's current complaint proceeding rules, an issue can be "ripe" for Commission consideration 30 days after filing the complaint.[40] Using the capabilities of the existing enforcement process would accommodate two concerns: (1) the need for quick access; and (2) the need for *ad hoc* resolution of fact-intensive issues which often implicate electric system safety and reliability.

[38] FNPRM, ¶ 22 ("This enforcement process has not always led to clear standards, due to the incentives to reach negotiated settlements as well as the *fact-intensive nature of many disputes*.") (emphasis added).

[39] The Florida IOUs previously endorsed an expedited access complaint process ("rocket docket"), so long as the Commission continues to handle access issues on an *ad hoc* basis with a specific fact record rather than through rules of general applicability. *See,* e.g., Letter from Eric B. Langley to Marlene H. Dortch, GN Docket No. 09-51; WC Docket Nos. 07-245 & 09-154 (Dec. 3, 2009); Letter from Eric B. Langley and J. Russell Campbell to Marlene H. Dortch, WC Docket No. 07-245 (Apr. 13, 2009), at 5.

[40] Under Rule 1.1407, a respondent pole owner has 30 days to file a response. Though a complainant *may* file a reply within 20 days thereafter, there is no requirement that it do so, nor is there any requirement that complainant take the full 20 days to reply. The only time period within the pole owner's exclusive control is the 30-day period within which to file a response. All other time periods are exclusively within the complainant's or the Commission's control.

Second, in its discussion of the proposed access rules, the Commission improperly combines the "just and reasonable" standard with the "nondiscriminatory" standard.[41] The standard by which the Commission evaluates "*rates terms and conditions* for pole attachments" is the "just and reasonable" standard.[42] The standard by which the Commission evaluates access is the "nondiscriminatory" standard.[43] While there is some overlap between these concepts, they are by no means congruous:

> While many courts and regulatory agencies confuse the concepts of just and reasonable rates and nondiscriminatory rates, each concept deals with a separate rate issue. The setting of nondiscriminatory rates concerns the issue of whether different rates are being charged for the same service, whereas the setting of just and reasonable rates concerns the issue of whether rates are set at a lawful level. Therefore, just and reasonable rates may be discriminatory, and nondiscriminatory rates may not be just and reasonable.[44]

Congress chose a different standard in the access provision of the Act (section 224(f)) for a reason. The Commission is not at liberty to ignore this difference by assuming that "just, reasonable and nondiscriminatory" is a hybrid-diluted standard by which it can regulate pole attachment access issues. The Commission's regulatory authority over access-related issues should be limited to determining – in the context of a dispute – whether an electric utility is applying its access standards in a nondiscriminatory manner. The Commission does not have general authority to regulate access, and should not attempt to determine (through a rulemaking

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[41] FNPRM, ¶ 22; *see also* Order, ¶ 17 (stating that access to poles "must be timely in order to constitute just and reasonable access"); FNPRM, ¶ 25 ("timely action … is important to ensure just and reasonable access to poles"); FNPRM, ¶ 30 ("section 224 imposes a responsibility on utilities to provide just and reasonable access to any pole, duct, conduit, or right-of-way owned or controlled by it").

[42] 47 USC § 224(b)(1).

[43] 47 USC § 224(f)(1).

[44] *Kansas Cities v. FERC*, 723 F.2d 82, 94 (D.C. Cir. 1983) (citing R. Pierce, G. Allison & P. Martin, *Economic Regulation: Energy, Transportation and Utilities* 315 (1980)).

or otherwise) whether an electric utility's access standards (a/k/a safety and reliability standards) are "just and reasonable."

Third, to the extent the Commission's proposed access rules touch the make-ready process – the process by which pole capacity is expanded – the Commission's statutory authority is limited, if it exists at all. If the proposed rules are intended to require rearrangement of electric facilities in the supply space, this expansion of Commission regulation is at odds with previous binding interpretations of section 224(f)(2) and an electric utility's right to deny access where there is insufficient capacity for the new attachment.[45] Because electric utilities are statutorily exempt from performing make-ready (*i.e.* resolving "insufficient capacity"), the Commission cannot dictate *when* make-ready must occur or by *whom* it can be performed.[46]

B. The Proposed Five-Stage Access Timeline Contains Some Tolerable Elements, and Other Elements Which Are Unworkable and Unlawful

Setting aside the flawed premises raised above, there are certain aspects of the proposed five-stage access timeline for wireline attachments which are tolerable to the Florida IOUs for practical purposes. There are also certain aspects of the timeline which are unacceptable and ripe for abuse. On the whole, the Florida IOUs believe proposed Rule 1.1420 attempts to cover too much detail, and fails to recognize that electric utilities are typically minimally involved in

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[45] *Southern Company v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002) (Section 224(f)(2) "carves out a plain exception to the general rule that a utility must make its plant available to third-party attachers….The FCC's attempt to mandate capacity expansion is outside of the purview of its authority under the plain language of the statute."); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370 (2002) ("Indeed, Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime. 47 U.S.C. § 224(f)(2).").

[46] The Order, adopted and released simultaneously with the FNPRM but not published until August 3, 2010, attempts to resolve part of this issue by redefining the term "insufficient capacity." (See generally, Order, ¶¶ 14-16). This portion of the Order, which the Florida IOUs believe is contrary to binding judicial and Commission precedent, will be addressed in more detail at the appropriate procedural juncture.

communications space make-ready work. Prospective attachers bear ultimate responsibility for the timely completion of their projects. Most time-consuming make-ready projects can be avoided on the front-end through proper planning and alternate route selection (or burying facilities underground). Nonetheless, the Florida IOUs offer the following comments on each of the proposed five stages.

1. Stage 1 – Survey (45 Days)

The timing aspect of proposed Rule 1.1420(b) is generally acceptable to Florida IOUs, so long as the Commission intends to respect contractual provisions and other operating procedures that limit the number of poles/applications allowed in a particular time period.[47] For example, PEF's pole license agreements limit the number of applied-for poles to 500 per 45-day period.[48] TECO's pole license agreements limit attachers to 10 applications per 30-day period, covering no more than 120 poles.[49] Though the vast majority of pole attachment applications are nowhere near the limits, these front-end limitations help the pole owner manage the worst case scenario while providing predictability (for project planning purposes) to attachers. Electric utilities without specific limitations often encourage or require attachers to provide advance notice of large applications to allow both parties an opportunity to plan. For example, upon notice of a large project, FPL will give the applicant instruction on segmenting its project into manageable sections and prioritizing its submittal based on planned construction for purposes of efficient permit application processing.[50] Even without specific limitations, the Florida IOUs expect

[47] To the extent proposed Rule 1.1420(b) addresses the use of contractors, the Florida IOUs comment separately on this issue in part II.C *infra*.

[48] Freeburn Decl. at ¶ 6.

[49] O'Brien Decl. at ¶ 8.

[50] Kennedy Decl. at ¶ 8.

attachers will continue to engage in mutually beneficial practices that prevent – rather than promote – application logjams.

The proposed revisions to Rule 1.1403(b) are unnecessary. As the Commission notes, the existing rule "is functionally identical to a requirement for a survey and engineering analysis when applied to wired facilities, and is generally understood by utilities as such."[51] Under the existing rule, there are two circumstances addressed: (1) a grant of access; and (2) a denial of access. The Commission proposes injecting a third circumstance into the rule – a "grant of access conditioned on performance of make-ready." In statutory terms, there is already a name for this "third" circumstance – a denial of access under section 224(f)(2). The Commission's proposed language would blur the statutorily clear distinction and inject ambiguity, rather than clarity, into a rule the Commission itself believes is working just fine.

The Commission also seeks comment on "whether [it] should clarify what constitutes a sufficient request to trigger the timeline" or whether it should "leave the details of the application process in the hands of individual parties."[52] The Florida IOUs strongly urge the Commission to leave the details of the application process in the hands of individual parties. Most electric utilities itemize the specific application requirements in a "permit manual" or other posted criteria. For example, Gulf and FPL both have detailed permit manuals which explain the application and attachment process, as well as numerous examples to guide field personnel through the process.[53] TECO uses a web-based application platform, which provides an on-line, step-by-step, item-by-item description of the application and attachment process.[54]

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[51] FNPRM, ¶ 35.

[52] FNPRM, ¶ 37.

[53] Bowen Decl. at ¶ 7; Kennedy Decl. at ¶ 10.

[54] O'Brien Dec. at ¶ 7.

Different pole owners have different application requirements, which may be driven by a variety of factors including the permitting contractor (if any) used by a pole owner and state regulatory requirements. The Florida IOUs collectively use three different permitting contractors for some or all parts of the application process in order to balance the demands of attachers with the utility's own operational requirements.[55] As part of the FPSC Storm Hardening requirements, each of the Florida IOUs requires pole loading analysis (among other things) in the application packet.[56] There simply are too many variables for the Commission to effectively clarify what constitutes a sufficient request to trigger the timeline.

The Commission seeks comment on "whether timing should be adjusted when an application that appears complete includes errors that delay the survey."[57] The simple answer to this question is "yes" – a latent error discovered after the 45-day timeline is triggered should stop the clock and reset the clock once the error is resolved. The Commission should not attempt to define the type of errors that stop/reset the clock, as there are far too many possibilities to effectively regulate this issue through a rule of broad applicability. The 45-day period, along with a common-sense principle of clock-stopping/resetting, should be sufficient to guide the parties without the type of micro-management that sets the process up for failure. The Commission also asks: "Should it matter whether the errors reflect lack of due care by the applicant, or lack of information that the utility could have provided."[58] The answer to this question is "no." The applicant should be solely responsible for the completeness of its application. Plus, injecting a "lack of due care" or "could have provided" test into the analysis

[55] Freeburn Decl. at ¶ 7; Kennedy Decl. at ¶ 10; O'Brien Decl. at ¶ 9; Bowen Decl. at ¶ 7.

[56] *See, e.g.* Bowen Decl. at ¶ 7.

[57] FNPRM, ¶ 37.

[58] FNPRM, ¶ 37.

leaves too much room for dispute and subjective interpretation. An error is an error, regardless of how or why it occurred.

2. Stage 2 – Estimate (14 Days)

The concept embodied in proposed Rule 1.1420(c) is acceptable, but the Florida IOUs have concerns regarding the specific language in the proposed rule. The proposed rule states: "Within 14 days of providing a survey as required by section 1.1420(b), a utility *shall tender an offer to perform all necessary make-ready work*, including an estimate of its charges."[59] There are two problems with the italicized language.

First, this language seems to imply that an electric utility *must* offer to both rearrange its supply facilities, and change-out a pole to accommodate a new attachment. Electric utilities cannot be required to perform this type of work. Even the Commission specifically acknowledged an electric utility cannot be forced to change-out a pole to accommodate a new attachment.[60] Whatever the case, there are definite limits on whether and to what extent an electric utility must perform or allow make-ready. The language of the rule seems to ignore those limits by broadly capturing "all necessary make-ready work."

Second, the italicized language could be read to require an electric utility to actually *perform* communications make-ready (or make-ready on other third-party attachments, such as governmental entities). Not only do the Florida IOUs typically avoid performing communications make-ready work (for numerous reasons ranging from contractual prohibitions

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[59] FNPRM, App. B ¶ 7 (emphasis added).

[60] *See, e.g.,* Order, ¶ 16; FNPRM, ¶ 36. Or maybe not. Though the text of the Order and FNPRM seems to indicate electric utilities are never required to replace a pole to accommodate a new attachment, footnote 37 (which admittedly is not part of the version of the Order published in the Federal Register) defines "make-ready" specifically to include pole-change outs. The Commission then proceeds to use the defined term "make-ready" no less than 16 times in its proposed rules. The inconsistency on a matter of such importance is troubling, to say the least.

to liability, to limited resources, to union restrictions), but requiring electric utilities to perform certain work at the request of a communications attacher would be outside the Commission's statutory authority.

The Florida IOUs instead propose the following revised version of proposed Rule 1.1420(c):

> Within 14 days of providing a survey as required by § 1.1420(b), a utility shall tender an offer to perform ~~all~~ any necessary make-ready work it agrees to perform, including an estimate of its charges.[61]

This language would give effect to the Commission's intentions without encroaching on an electric utility's right to deny access for the reasons set forth in section 224(f)(2), and without putting electric utilities in the position of on-demand communications contractors.

3. Stage 3 – Acceptance (14 Days)

Subparts (1) and (2) in proposed Rule 1.1420(c) are acceptable to the Florida IOUs, with the following exception to Rule 1.1420(c)(1):

> The requesting entity may accept a valid offer and make ~~an initial~~ payment upon receipt, or until the offer is withdrawn.

This proposed change is consistent with the Florida IOUs' objections to the "staged" make-ready payment protocol in proposed Rule 1.1426 (addressed in part II.D, *infra*).

4. Stage 4 – Performance (45 Days)

The workability of proposed Rule 1.1420(d) depends entirely on the scope of make-ready work contemplated by the proposed rule. The only specifically stated limitation set forth in the FNPRM is that the proposed rule does not apply to make-ready jobs involving pole

[61] Throughout these comments, where the Florida IOUs propose specific rule language, the text will be presented in strikethrough form as compared to a "clean" version of the Commission's proposed rule.

replacement.[62] Assuming the rule is not intended to apply to pole replacements, there are at least two possible interpretations of the proposed rule: either (1) the proposed deadline applies only to make-ready work in the communications space; or (2) the proposed deadline applies to any make-ready the utility allows or agrees to perform. The analysis of this issue is also inextricably intertwined with an electric utility's right to deny access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[63] If the make-ready contemplated by this rule is limited to communications space make-ready, then 45 days is an acceptable time frame. If the make-ready at issue includes supply space make-ready, then a 45-day deadline is unworkable, counterproductive and contrary to an electric utility's right to deny access under section 224(f)(2). For purposes of clarity, the Florida IOUs address each of these potential interpretations separately.

a. If the Rule Applies Only to Make-Ready in Communications Space

This interpretation seems most closely aligned with both the text of the proposed rule and the limits of the Commission's regulatory authority. The language of the proposed rule appears targeted towards a pole owner's obligations vis-à-vis existing attaching entities, and the movement of facilities owned by those attaching entities. The proposed rule does not appear to address an electric utility's obligation to move its own facilities. This interpretation also is supported by two other portions of the Commission's proposed rules: (1) the rule allowing a requesting entity to use a contractor to complete all make-ready work if the work is not completed in the prescribed time period (proposed Rule 1.1420(f)); and (2) the rule allowing an electric utility to exclude non-utility personnel from working among electric lines on a utility

[62] FNPRM, ¶ 36.

[63] 47 USC § 224(f)(2).

pole (proposed Rule 1.1424(a)). If the requesting entity's remedy for a utility's failure to meet the deadlines is to use a contractor for the make-ready, but electric utilities can exclude contractors from the supply space, it stands to reason that the only make-ready covered by the proposed rule is communications space make-ready – not supply space make-ready.

If this is the correct interpretation, then a 45-day deadline is workable from the Florida IOUs' perspective because most of the work at issue would be performed by either the existing attachers or the prospective attacher's contractor. The Florida IOUs support the Commission's intent to extend the obligation to complete make-ready in a timely fashion to "existing attachers,"[64] but note (as the Florida IOUs noted in their earlier comments and *ex parte* presentations) that many attachments belong to entities *other* than cable television systems and telecommunications carriers – in other words, entities outside the reach of the Commission's jurisdiction. For example, FPL has more than 10,000 governmental attachments (traffic control, traffic signals, essential services, Wi-Fi attachments, public works automated metering equipment, public radio and television communication cable, school networks, surveillance cameras, community plaques) on its distribution poles;[65] PEF has approximately 4,000 governmental and private attachments;[66] Gulf has roughly 1,500 governmental attachments;[67] and TECO has more than 11,000 attachments on its distribution poles that are owned by governmental entities or other entities that are neither cable television nor telecom.[68] Thus, even

[64] FNPRM, ¶ 41.

[65] Kennedy Decl. at ¶ 6.

[66] Freeburn Decl. at ¶ 5.

[67] Bowen Decl. at ¶ 6.

[68] O'Brien Decl. at ¶ 6.

an aggressive and broad policy regarding "existing attachers" will not reach all players necessary to accomplish the Commission's objective.

Given the fact that Commission rules will not reach governmental and private attachments (among others), the Florida IOUs also urge the Commission to avoid putting pole owners in the untenable position of coordinating "the sequence and timing of rearrangement" for all existing attachers, as currently proposed in Rule 1.1420(d)(2).[69] Proposed Rule 1.1420(e) seems to implicitly acknowledge this gap in the Commission's authority where it articulates protocol for rearranging or replacing an "incumbent local exchange carrier's facilities" and a "cable system operator's or telecommunications carrier's remaining facilities," but not any other specifically enumerated facilities within the communications space.[70] Moreover, though the sequence and timing of rearrangement in the communications space is often facilitated by the National Joint Utilities Notification System ("NJUNS"), the ultimate responsibility for coordinating the rearrangement should remain on the shoulders of the party seeking access.

For this reason, the Florida IOUs request the following revisions to proposed Rule 1.1420(e):

> (e) If make-ready work is not completed by ~~any other~~ attaching entities ~~as required by~~ within the time frame set forth in paragraph (d) above, ~~the utility or its agent shall complete all necessary make-ready work.~~ then:
>
> (1) An incumbent local exchange carrier's facilities may be rearranged or replaced by the utility or ~~its agents~~ the requesting entity 45 days after the notice required in paragraph (d) above.

[69] FNPRM, App. B ¶ 7.

[70] *Id*. Though subparts (1) & (2) to Rule 1.1420(e) specifically address ILECs, CATVs and other telecom carriers, the text immediately prior to the subparts actually uses broader language in requiring a utility to "complete *all* necessary make-ready work" without regard to whether the make-ready work involves facilities under the Commission's jurisdiction or not. *Id.* (emphasis added).

(2) A cable system operator's or telecommunications carrier's remaining facilities may be rearranged or replaced by the utility or ~~its agents~~ the requesting entity 60 days after the notice required by paragraph (d) above.

The above-proposed revisions would clarify that an electric utility is not responsible for the gap in the Commission's authority, and would acknowledge the reality that most make-ready within the communications space is handled without significant involvement by the electric utility pole owner. [71]

b. If the Rule Applies to *Any* Make-Ready (other than pole change-outs)

The Commission can only require an electric utility to complete a task within a specific time frame if the Commission can require the electric utility to complete the task *at all*. The Florida IOU's main concern, here, is potentially being forced to perform complicated (and labor intensive) supply space rearrangement on multiple poles within 45 days. If the Commission's intent is to impose the deadline on an electric utility when an electric utility voluntarily agrees to perform make-ready, then the deadline might actually slow deployment and increase the cost. For example, if the most efficient make-ready solution to a particular request for attachment involves a complicated rearrangement of electric supply facilities, an electric utility is faced with the choice of either (a) complying with an arbitrary 45-day deadline at the risk of exposing itself to the expanded remedies available to attachers under the Commission's proposed revisions to

[71] The Florida IOUs' proposed revisions to Rule 1.1420(e)(1) assume – without taking a position on the issue – that the Commission has authority to require an ILEC to move its facilities on an electric utility's pole. The proposed revisions also assume (a) the rearrangement will not encroach on an ILEC's allocated space under a joint use agreement, (b) the requesting entity has secured permission from the ILEC to use a portion of the ILEC's allocated space, or (c) the Commission will deal with the fallout (and protect an electric utility pole owner) when a requesting entity unilaterally moves an ILEC attachment in violation of the ILEC's rights under a joint use agreement with an electric utility. Because all of these issues were raised and discussed in detail by virtually every electric utility commenter in the underlying proceedings, the Florida IOUs presume the Commission is aware of these issues and has considered how these issues impact the proposed rules vis-à-vis ILEC rights under joint use agreements.

Rule 1.1410, or (b) denying the request under its section 224(f)(2) rights. Forcing electric utilities into this dilemma is counterproductive to the Commission's overarching goal of streamlining deployment and promoting competition.

Numerous factors, many of which are beyond an electric utility's control, can impact the length of time it takes to complete make-ready in the electric supply space. For example, if the supply space make-ready job requires a power outage, the outage must be scheduled with impacted customers. Depending on the nature of the customers impacted, this can be a difficult process which requires significant lead time. In FPL's territory, the majority of hospitals require advance notification and scheduled outages during their off-peak hours. Two years ago, FPL had to install a generator onsite at one hospital because an outage was taking longer than the hospital could accommodate.[72] The time it takes to complete an electric construction job also depends on the number and complexity of other jobs in the work order queue, which varies from time to time. Sometimes a construction job might be delayed because it requires a material the electric utility does not have in inventory. For example, if the job requires a height and class of pole that is not stocked in the utility's inventory, the lead time for acquiring the necessary pole is typically 120 days.[73]

c. Suggested Revisions to Proposed Rule 1.1420(d)

The Florida IOUs suggest the following revisions to proposed Rule 1.1420(d):

(d) Upon receipt of payment, a utility or the requesting entity shall notify immediately all attaching entities that may be affected by the project, and shall specify the date ~~after~~ by which ~~the utility or its agents become entitled to move the facilities of the attaching entity~~ the attaching entity should rearrange or remove its facilities.

[72] Kennedy Decl. at ¶ 16.

[73] Freeburn Decl. at ¶ 8.

(1) The utility or requesting entity shall ~~set a date for~~ request completion of ~~make-ready~~ work no later than 45 days after the notice.

(2) Where necessary and feasible, ~~T~~the utility shall ~~direct and~~ cooperate with the requesting entity to coordinate the sequence and timing of rearrangement of facilities ~~to afford each attaching entity a reasonable opportunity to use its own personnel to move its facilities~~.

(3) Completion of all make-ready work and ~~final~~ receipt of full payment by the requesting entity shall complete the grant of requested access and all necessary authorization.

5. Stage 5 – Multiparty Coordination (30 Days)

The Florida IOUs agree with the concept of extending the timeline when other attaching entities fail to timely perform make-ready work, but the Florida IOUs are unclear as to when the rule would apply or how it would work. If the make-ready contemplated by the timeline is limited to communication space make-ready, this stage may be entirely unnecessary. It might be more efficient to simply allow the requesting entity to move the existing ILEC attachments on the 45th day (except in those situations where the ILECs attachments must be moved after other attachments) and cable system or telecommunications attachments on the 60th day without establishing a time period during which this must occur. The reality is that this work will be done by the requesting entity or its contractor – not by the electric utility.[74] The movement of communications lines often involves a different set of skills than those possessed by electric line crews.[75] Thus, the timing is (and should be) completely within the control of the requesting entity. Proposed Rule 1.1420(f) (allowing use of outside contractors where make-ready is not

[74] Freeburn Decl. at ¶ 13; Cutshaw Decl. at ¶ 7; Kennedy Decl. at ¶ 12; O'Brien Decl. at ¶ 11; Bowen Decl. at ¶ 10.

[75] Freeburn Decl. at ¶ 13.

timely completed) appears to be drafted with this reality in mind, insofar as the proposed rule itself says nothing of the additional 30 day period addressed in the discussion of "Stage 5."[76]

Despite the ambiguity as to how or when Rule 1.1420(f) would apply, the Florida IOUs do not object to the language of the rule as drafted. In fact, if the make-ready work at issue is completely within the communications space, the Florida IOUs see no reason the requesting entity cannot (cloaked with authority from the Commission) proceed immediately with make-ready work after allowing the existing attachers the reasonable opportunity to move their own facilities (as set forth in proposed Rule 1.1420(d)). In this situation, the requesting entity need not wait for the electric utility to do *anything*. This issue should be between the requesting entity, the existing attachers (to the extent subject to the Commission's pole attachment jurisdiction), and the Commission.

6. Necessary Adjustments To Timeline

Consistent with their comments regarding the application process in part II.B.1 above, the Florida IOUs strongly urge the Commission to leave the details of timeline adjustments in the hands of individual parties. One of the main reasons electric utilities have limits on the number of applications during a given time frame is to prevent engineering and make-ready logjams.[77] No attaching entity has ever voiced a complaint to the Florida IOUs about these limitations.[78] If an attaching entity believes a limitation is unjust or unreasonable (and cannot resolve the issue directly with the utility) it can challenge the limitation in a complaint proceeding.

The potential circumstances warranting an adjustment to the timeline or stopping and resetting the clock are too numerous to name. Federal, environmental, state, county and city

[76] *Compare* FNPRM, ¶¶ 43-44, *with* proposed Rule 1.1420(f).

[77] Freeburn Decl. at ¶ 6; O'Brien Decl. at ¶ 8.

[78] *Id.*

permitting issues may delay the process; private permitting, *e.g.*, work within a railroad right of way; governmental mandated limited work time-frames; maintenance of traffic issues; labor strikes; the need to schedule electric outages; the need to schedule electric switching; and weather may delay the process. Hurricane season runs from June 1 through November 30 (with August and September yielding the most storms). If a hurricane makes a direct hit on an electric utility's service territory, it can take weeks (sometimes months) to resume normal operations. For example, after Hurricane Ivan (2004), it took Gulf 13 days to restore power to all customers who could receive service.[79] During the 2004 season, PEF was hit by four hurricanes (Jeanne, Charlie, Frances, and Ivan) within a period of 7 weeks; it took approximately 10-12 weeks to return to normal operations.[80] During that period of time, PEF suspended permitting so it could focus on power restoration.[81]

Depending on the damage inflicted by a hurricane, an electric utility might resume normal operations in as little time as a few days, but its crews might be dispatched on mutual assistant assignments for up to two months. The Florida IOUs are each members of the Southeastern Electric Exchange ("SEE"). One of the principal purposes of SEE is mutual assistance – coming to the aid of a member utility in emergency situations or massive outages. For example, after Hurricane Katrina (2005), *all* of the Florida IOUs sent crews to Mississippi and/or Louisiana to assist in the recovery under the SEE mutual assistance arrangement.[82] TECO, had crews deployed to other utilities for 6-8 weeks after Hurricane Katrina.[83] After

[79] Bowen Decl. at ¶ 14.

[80] Freeburn Decl. at ¶ 9.

[81] *Id.*

[82] Freeburn Decl. at ¶ 10; Cutshaw Decl. at ¶ 8; Kennedy Decl. at ¶ 11; O'Brien Decl. at ¶ 10; Bowen Decl. at ¶ 14.

[83] O'Brien Decl. at ¶ 10.

Hurricane Wilma (2005), it took FPL 4-6 months to complete most distribution system follow-up work; some of the work took as long as 12 months to complete.[84] Notwithstanding the very real problems presented by storms and the unavoidable delays to non-restoration work, the Florida IOUs are not requesting a specific "storm exception" to the proposed timelines.

On the other end of the spectrum, the Florida IOUs do not support specific exceptions that would automatically justify expediting attachment requests.[85] As a practical matter, many electric utilities (or their permitting contractors) can and do expedite specific requests to meet critical business need. For example, on January 4, 2008, FPL and its permit contractor received a request for expedited make-ready from one of its telecommunications attachers.[86] The attacher needed make-ready in order to gain vertical clearance over an interstate highway by February 1, 2008.[87] Through cooperation of all parties, the permit application, contractor engineering, make-ready payment and FPL construction were all completed by January 31, 2008.[88] However, the details of such expedited requests must be worked-out by the parties on an *ad hoc* basis, and depend on countless unquantifiable circumstances. There is simply no way to mechanize this process to the level envisioned by the Commission. The access process involves judgment, reason, common sense, interpersonal cooperation, relationships and flexibility – and always will. These ingredients cannot be hardwired into broadly applicable rules.

[84] Kennedy Decl. at ¶ 11.

[85] *See* FNPRM, ¶ 50.

[86] Kennedy Decl. at ¶ 17.

[87] *Id.*

[88] *Id.*

7. Wireless Attachment Timeline

The FNPRM seeks comment on "developing timelines for section 224 access other than wired pole attachments."[89] The key difference in the process between wireline and wireless attachments is the initial engineering evaluation, particularly when an electric utility is dealing with a wireless carrier or a certain type of device for the first time. Unlike wireline attachments – which are fairly consistent from an engineering perspective – wireless antennae vary considerably in dimension, placement on the pole, vertical and horizontal space occupied, and loading profile. Some carriers even use different types of antennae in different places. In the past year alone, FPL has reviewed at least six different types of antennae, each with unique safety, work method and reliability implications.[90] Depending on the type of attachment proposed, an electric utility may need to develop an entirely new overhead distribution construction specification (which requires evaluation of work methods, safety methods and engineering impact on the pole or electric facilities).[91] Electric utilities often request a sample device for review, and may use a "test run" to ensure thorough evaluation,[92] or require the company to submit a prototype.[93] Approval of a wireless antenna that covers a significant portion of the pole circumference may require additional engineering approval because installation of the antenna will render the pole un-climbable.[94] In addition to the proposed antennae itself, there is often associated equipment that may complicate the engineering analysis

[89] FNPRM, ¶ 52.

[90] Kennedy Decl. at ¶ 7.

[91] *See* Freeburn Decl. at ¶ 11; Kennedy Decl. at ¶ 7.

[92] Kennedy Decl. at ¶ 7.

[93] Freeburn Decl. at ¶ 11.

[94] Kennedy Decl. at ¶ 7.

and require both parties to revisit certain aspects of their specifications.[95] Once the initial engineering evaluation is completed, and necessary new specifications are created, the application process is much faster for subsequent requests involving identical attachments. For example, once FPL approves an antenna for attachment, it provides the attacher an "approved" form for submittal with future permit applications.[96] Though the Florida IOUs do not support any mandatory timelines for wireless attachment access, any timeline would need to account for the special engineering and survey issues addressed above.

C. The Proposed Rules Regarding Use Of Outside Contractors Appear To Be Acceptable So Long as They Are Limited to Work in the Communications Space

The Florida IOUs understand the proposed rules regarding use of outside contractors to be limited to work in the communications space. These rules do not appear to require an electric utility to allow any outsider (attachers or outside contractors) into the electric supply space for any purpose, other than the limited, specific and rare circumstance described in proposed Rule 1.1424(a) (and subject to the limitations set forth in proposed Rule 1.1424(b)). If the Florida IOUs' understanding is correct, the Commission's proposed rules and statements of policy regarding the use of outside contractors properly recognize that the supply space is off-limits to non-utility personnel except in rare circumstances (and even then, subject to the utility's safety judgment).

The Florida IOUs' primary concern expressed in the original comment cycle was resource diversion, but this concern was based on the belief that communications attachers might

[95] Freeburn Decl. at ¶ 11.

[96] Kennedy Decl. at ¶ 7.

be hiring *electric* contractors to perform make-ready work in the electric supply space.[97] The Florida IOUs now understand this is not the case insofar as proposed Rules 1.1420(f) and 1.1424 collectively restrict third-party contractors to communications make-ready and installation, and specifically allow electric utilities to exclude non-utility personnel from the electric supply space. Given these limitations, the Florida IOUs believe the proposed rules strike the appropriate balance between the interests of communications attachers and "utilities' concerns regarding safety, reliability, and sound engineering."[98]

The Florida IOUs suggest the following revisions to proposed Rule 1.1424 to clarify the intent of the rule as expressed in the FNPRM:

> (a) Utilities may exclude non-utility personnel from working among the electric lines on a utility pole ~~except workers with specialized communications equipment skills or training that the utility cannot duplicate which are necessary to add or maintain a pole attachment~~.
>
> (b) Utilities shall permit workers with specialized skills or training concerning communications equipment to work among the electric lines when such workers are necessary to add or maintain a pole attachment and the utility cannot duplicate such skills:
>
> (1) in concert with the utility's workforce; and
>
> (2) when the utility deems it safe, and where reliability will not be adversely impacted.

The Commission's proposed rules also properly draw a distinction between the use of contractors for survey and make-ready, on the one hand, and post-make-ready attachment on lines on the other hand. The Florida IOUs' concerns regarding third-party contractors principally relate to the survey and engineering work, as this is the foundation upon which attachments are

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[97] The FNPRM specifically references this concern, and states the Commission is "unpersuaded by contentions from certain utilities that our decisions on outside contractors will lead to resource diversion of non-employee 'resources.'" (FNPRM, ¶ 63 (citing Florida IOUs' Comments)).

[98] FNPRM, ¶ 58.

made safely and without compromising electric reliability. As set forth above, make-ready in the communications space is typically handled without significant involvement by electric utilities. Existing attachers usually rearrange or remove their own attachments, or reach some other agreement with the prospective attacher. Electric utilities are almost never involved in the actual post-make-ready attachment of lines. This is handled by the attacher or its contractor, and is usually post-inspected by the electric utility or its contractor to ensure it has been done correctly. The only time an electric utility will intervene in the post-make-ready attachment of lines is if it acquires actual knowledge of some dangerous or unauthorized practice. For example, in June 2010, TECO had to stop a cable operator's contractor from working on the system because the contractor was working without a hard hat in a bucket, and the contractor's head was less than one-foot from the bottom hot leg of an open wire secondary.[99] Similarly, in March of 2009, a contractor installing a broadband WiFi antenna on FPL's facilities in the city of Hollywood, Florida made contact with FPL's open wire when his uncovered (no hard hat) head touched the wire above him.[100] FPL and OSHA arrived at the site simultaneously and both shut the contractor down. OSHA cited the contractor for not observing safety rules, the employee for not wearing his safety equipment, and the bucket truck for not being insulated.[101]

D. Comments on the Proposed "Other Options to Expedite Pole Access"

1. The Proposal To Stage Payment for Make-Ready Work Is Bad Business and Bad Policy

Proposed Rule 1.1426(b), which proposes to "stage" make-ready payments, is inconsistent with current practice, out-of-touch with comparable circumstances in other

[99] O'Brien Decl. at ¶ 11.

[100] Kennedy Decl. at ¶ 13.

[101] *Id.*

commercial contexts, adds further administrative burden to all parties, is potentially counterproductive to the Commission's goals, and discriminates against other customers for whom the Florida IOUs perform various types of construction work.

To the extent a make-ready project requires construction activity by the Florida IOUs (such as supply space rearrangement), the cost of such activity (materials and labor) is paid up-front by the requesting entity.[102] The FNPRM seeks comment on "what schedule of payment is normal in comparable circumstances in other commercial contexts."[103] Every entity for which the Florida IOUs perform construction work, with the exception of governmental entities, pays up-front.[104] For example, if a customer wants a street light installed on a pole, payment is made up-front; if a customer wants to convert from overhead to underground service, payment is made up-front; if a pole needs to be relocated because a customer is building a turn lane, payment is made up-front; if a service drop needs to be relocated because a customer is installing a pool, payment is made up-front.[105]

The multiple billing/payment stages in the proposed rule also would add further administrative burden to both the pole owner *and* the requesting entity. Rather than one billing/payment point (or perhaps two, if a post-construction true-up is involved), the Commission proposes *three* billing/payment points. This has the potential of actually slowing the make-ready process by adding additional incremental steps between the tender of a make-ready estimate and the completion of make-ready work. Specifically, the proposed 25%

[102] Kennedy Decl. at ¶ 14; O'Brien Decl. at ¶ 12; Bowen Decl. at ¶ 9.

[103] FNPRM, ¶ 70.

[104] Kennedy Decl. at ¶ 14; O'Brien Decl. at ¶ 12; Bowen Decl. at ¶ 9.

[105] Kennedy Decl. at ¶ 14.

payment "22 days after the first payment" makes absolutely no sense. What if a make-ready job is fast-tracked and the make-ready can actually be completed within 10 days?

Finally, Section 366.03 Fla. Stats., which defines the general duties of public utilities, prohibits the Florida IOUs from "mak[ing] or giv[ing] any undue or unreasonable preference or advantage to any person" or subjecting its customers "to any undue or unreasonable prejudice or disadvantage in any respect." Proposed Rule 1.1426(b) does just that – discriminates in favor of communications attachers and against the Florida IOUs' other paying customers.[106]

Make-ready payments are actual cost recovery; there is no profit involved at all and it is not an investment opportunity. Neither the shareholders nor the electric customers should be forced to serve as creditors to communications firms. There are no suggested revisions the Florida IOUs can offer to rehabilitate proposed rule 1.1426(b). It is bad business, bad policy and bad law. The Commission should dispose of proposed rule 1.1426(b) in its entirety.

2. The Proposal To Make A Schedule Of Charges Available To Attaching Entities Is Acceptable So Long As The Schedule Is Understood As An Estimate

Proposed Rule 1.1426(a), requiring utilities to make available a "schedule of common make-ready charges," is acceptable so long as the schedule is understood as an estimate (not a price quote). Make-ready is priced based on the *specific* tasks at the *specific* location. Prices can vary depending on countless unique factors, including but not limited to the types of equipment required to perform the work, the location of the pole (front lot vs. rear lot), site conditions, the city/county permitting requirements, environmental issues, congested attachments, necessary

[106] In most construction jobs, the Florida IOUs also stand to earn meaningful additional revenue as a result of the construction. This is not the case with pole attachment make-ready, where providing additional space on a pole yields meager incremental revenue (revenue the Commission seems intent on lowering).

switching and necessary tree trim.[107] In order to create a firm price sheet, the Florida IOUs would have to price common make-ready charges at a level that recovered the costliest permutation of potential factors, which would result in significant over-pricing for less costly circumstances. To this end, the Florida IOUs suggest the following revisions to proposed Rule 1.1426(a):

> Utilities shall make available to attaching entities ~~a~~ an estimated schedule of common make-ready charges. The estimates shall not be binding on the utility, and may be revised by the utility from time to time to reflect updated costs.

These suggested revisions would allow an electric utility to provide good faith, ball-park estimates (or ranges) of common charges under the most common circumstances, without institutionalizing unrealistic expectations on the part of prospective attachers.

3. The Request For Comment On Implementing The New "Attachment Techniques" Rule Puts The Cart Before The Horse

The FNPRM states: "[i]n the Order, we clarified that the Act requires a utility to allow cable operators and telecommunications carriers to use the same pole attachment techniques that the utility itself uses or allows."[108] The FNPRM then seeks comments on several specific aspects of the implementation of this new rule, including whether a utility should be able to prevent boxing and bracketing on a going-forward basis where it has allowed such practices in the past, and whether a utility's decisions regarding the use of boxing and bracketing should be made publicly available. This inquiry puts the cart before the horse, procedurally and substantively.

The Order, which is not effective until September 2, 2010, requires significant clarification and raises serious questions of law and policy that strike at the heart of an electric

[107] Kennedy Decl. at ¶ 15.

[108] FNPRM, ¶ 74.

utility's rights under section 224(f)(2). Because the Commission's request for comment regarding the implementation of the new rule necessarily presumes the effectiveness of the new rule, it is procedurally premature.

The procedural prematurity might fairly be characterized as form-over-substance if there were not such serious substantive concerns associated with the Commission's new rule. The Florida IOUs' chief concern regarding the new rule is the rule's lack of clarity, specifically whether the new rule requires an electric utility to allow boxing and bracketing in the communications space simply because there are electric facilities on both sides of the pole in the supply space and/or because electric conductors are affixed to standoff insulator arms in the electric supply space. There are significant differences between the safety and reliability of certain construction practices in the communications space versus the electric supply space. To ignore these differences is to ignore safety and reliability.

The Commission's new rule regarding "attachment techniques" requires important clarification and/or reconsideration, which the Florida IOUs intend to request at the appropriate procedural juncture.[109]

E. Comments on "Improving the Availability of Data"

The FNPRM seeks comment on "how the Commission can improve the collection and availability of information regarding the location and availability of poles, ducts, conduits and rights-of-way."[110] As a preliminary matter, the Commission's authority to enact measures designed to accomplish this objective is questionable at best. There are no statutory provisions which allow the Commission to require an electric utility to collect or maintain *any* information

[109] The substantive concerns regarding the Commission's new rule regarding "attachment techniques" is exacerbated by the fact that the Commission expresses the rule in at least five different ways within the Order and FNPRM. *See* Order, ¶¶ 6, 8, 9, 10 and FNPRM, ¶ 74.

[110] FNPRM, ¶ 75.

(let alone in a particular format). Moreover, the Act as a whole places no burdens on an electric utility to create *anything* (including but not limited to additional capacity) for use by cable television systems and telecommunications carriers. Any effort by the Commission to place information collection/maintenance burdens on electric utilities would run afoul of the spirit of the Act.

Setting aside the statutory problem for a moment, the development and maintenance of information regarding "location" of poles and "availability" of poles are two different issues, which warrant two different responses.

1. Location of Poles

Most electric utilities – including all of the Florida IOUs – keep accurate information about distribution pole locations. There are a number of tools used for this purpose. For example, Gulf uses a Geographic Information System ("GIS") called DistGIS, which is an electronic model of Gulf's electrical system overlayed on a representation of the land base.[111] DistGIS allows Gulf to map the location of its distribution facilities (including but not limited to poles) and can interface with Gulf's Trouble Call System and customer service systems.[112] Though there are applications compatible with DistGIS which can track data regarding third-party attachments, those applications do not track as-built data with the type of specificity necessary to determine whether a particular pole (or any other point of network interest) is suitable in its present form for collocation.[113]

[111] Bowen Decl. at ¶ 8.

[112] *Id.*

[113] *Id.*

The information maintained on Gulf's DistGIS system is the information Gulf needs for its core business purposes.[114] Gulf's permitting contractor has access to this information, so that it can work with prospective attachers on preliminary route selection and ascertaining potential availability of infrastructure.[115] Neither Gulf nor the other Florida IOUs have received complaints from third-party attachers relating to the sufficiency of this type of information or their access to this information.[116] Commission regulation in this area would be an attempt to solve a problem that does not exist (likely creating its own problems – such as disputes over the level of detail and the geospatial precision of the maps – in the process).

2. Availability of Poles[117]

Utility pole networks are dynamic. Pole networks, and the individual poles within those networks, are constantly changing to meet the demands of electric customers, governmental entities, third-party attachers and the public. There is simply no possible way to track and maintain all pole-related data accurately and in real time. Even if this was possible in the normal course of business, a major event (such as a storm) could compromise the integrity of significant portions of this data. Under the best-case scenario, any database with information regarding the "availability" of poles is an approximation which must be verified with an actual field survey.

The inventory required to build a database that includes as-built pole data is costly and time consuming. Even assuming an electric utility has the necessary mainframe and software to enable such a database, the start-up cost of gathering data is exorbitant. A typical pole survey,

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[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] Presumably, by "availability" of poles, the Commission is referring to availability of space on a particular pole. Otherwise, "availability" would be largely redundant of "location" because almost all distribution poles are available for third-party attachments in a generic sense.

which is geared towards counting attachments, might cost $5 or less per pole. A survey which takes precise measurements of multiple dimensions (pole clearance and loading), along with digital photographs of each pole, can cost between $25 and $50 per pole. TECO, with cooperation from its attachers, uses a web-based pole attachment and make-ready platform called SpidaWeb for prospective attachers to preview routes for preliminary selection purposes and submit applications.[118] Even with this level of sophistication, a field check is still required before processing an application to verify field conditions because the data may be inaccurate due to the ever-changing nature of the electrical distribution pole system.[119] If the Commission believes these types of systems can circumvent the need for field surveys or result in lower make-ready costs, it is sorely mistaken.

Though SpidaWeb (and other similar platforms) can accommodate larger distribution systems, the complexities of maintaining the database increase with the size and geographic scope of a distribution system. TECO's distribution system is limited to Hillsborough County, and portions of Pinellas, Polk and Pasco Counties. TECO has 307,000 distribution poles in its entire system. It takes less than two hours to drive from one end of TECO's territory to the other.[120] FPL's territory, on the other hand, includes 35 counties and runs along the east coast of Florida from the Florida-Georgia border to the Florida Keys, and from the top of the Keys north to Tampa Bay on the west coast of Florida. FPL's system includes more than 1.1 million distribution poles and its overhead system contains more than 42,000 miles of line – equal to over 1.5 times the earth's circumference.[121]

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[118] O'Brien Decl. at ¶ 7.

[119] *Id.*

[120] *Id.* at ¶ 2.

[121] Kennedy Decl. at ¶ 2.

The FNPRM also seeks information about NJUNS. NJUNS, which is used by all of the Florida IOUs, is a useful and affordable tool for transfer, removal and rearrangement notifications. Representatives of TECO and Gulf currently serve on the NJUNS Board of Directors, and representatives of PEF have served on the Board of Directors in previous years.[122] Many electric utilities include provisions in their pole license agreements which require participation in NJUNS or some other electronic notification system of the utility's choosing.

For example, TECO's pole attachment agreements typically provide:

> Tampa Electric will submit written requests for removal of equipment to Licensee via the National Joint Use [sic] Notification System (NJUNS), which is a web-based electronic notification system that may be accessed through the internet. Licensee shall obtain a membership code through NJUNS, and shall maintain adequately trained personnel to manage correspondence transactions with Tampa Electric.[123]

Gulf's pole license agreements similarly provide:

> The parties recognize that improved coordination of activities under this Agreement is of benefit to all parties, and that Licensee's and Gulf's participation in the National Joint Utilities Notification System ("NJUNS"), a Web-based system developed for the purpose of improving the coordination of such activities, would improve their respective operations under this Agreement. Licensee will join NJUNS within 30 days of the execution of this Agreement (if it has not already) and, during the term of this Agreement or as long as Licensee has Attachments on Gulf's poles, will actively participate by entering field information into the NJUNS system within the times required by the system….[124]

NJUNS streamlines communication and speeds access, but it is not a one-stop solution to pole access. To the extent the Commission believes NJUNS is a comprehensive pole-access database platform, it is wrong. The primary purpose of NJUNS is to provide an electronic platform for transfer, removal and rearrangement notifications.

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[122] O'Brien Decl. at ¶ 5; Bowen Decl. at ¶ 13;

[123] O'Brien Decl. at ¶ 5.

[124] Bowen Decl. at ¶ 13.

The Commission asks "how can we ensure participation by all relevant parties, including timely updates of information?" The answer: the Commission cannot. Even if the Commission could require that cable television systems and telecommunications carriers participate in such a system, such a requirement (a) might be ignored, and (b) would not impact attachments outside the reach of Commission authority.[125]

3. The Solution

From the Florida IOUs' perspective, there is not a problem that needs solving. To the extent the Commission believes (based on data yet-to-be presented) that sophisticated databases are essential to broadband deployment, the Commission should encourage participation and clearly articulate that the beneficiaries of such technology should expect to bear the cost both initially and in the event the database needs to be reconstructed (such as in the event of a major storm that renders the database worthless). As set forth above, these are not cheap technologies. The FNPRM asks: "[h]ow can we ensure that the costs are shared equitably by pole owners and other users of the data?"[126] This is not only the *wrong* question, but also the type of question that will discourage pole owners from implementing such systems. Most electric utilities can meet their core service data collection needs with the mapping systems described in part II.E.1 above. They do not need the type of data collected and maintained by TECO through SpidaWeb. This benefits the attaching entities – not the electric utilities. Even if there is some marginal benefit to an electric utility having this type of data available, it is clearly secondary to the benefit provided to attaching entities. As such, it is appropriate for the attacher to bear the costs associated with

[125] This is a systemic problem with the Commission's overall approach in the FNPRM. The approach contemplates a "whole pole" solution, though the Commission lacks authority over key portions of the pole, including the electric supply space, the space occupied by governmental attachers, and possibly the space allocated to ILECs under joint use agreements.

[126] FNPRM, ¶ 76.

such databases. To put this in cost-causation terms: but for third-party attachers, no electric utility would ever invest in creating and maintaining such a database.

III. COMMENTS REGARDING DISPUTE RESOLUTION AND REMEDIES

A. The Commission's Dispute Resolution Procedures are Not in Need of Major Overhaul

1. Specialized forums and processes are unnecessary because the existing processes can be used more efficiently

The FNPRM asks "whether the Commission should modify its existing procedural rules governing pole attachment complaints," particularly inquiring about the creation of "specialized forums and processes for attachment disputes."[127] The Commission also asks several questions about the possible structure of specialized forums, the legal authority for these forums, and the possible models upon which they could be based.[128] From the perspective of the Florida IOUs, such changes are neither necessary nor desirable.

To "expedite the dispute resolution process," the simplest and least costly solution would be to promote efficiencies within the existing pole attachment complaint procedures. For example, the Commission could limit the circumstances under which extensions of time are granted, or issue decisions quickly after the parties have joined issue. At a basic level, though, the Commission should determine the specific problem areas in the existing process and correct them. The FNPRM makes no specific mention of what aspect of the existing dispute resolution process is the culprit. Without a discussion of those specifics, taking a chance on designing a whole new process is no guarantee that problems will be corrected. It will only create less familiarity with the processes for all parties involved.

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[127] FNPRM, ¶¶ 78-79.

[128] *Id.* at ¶ 80.

2. The Commission should retain the 30-day deadline in Rule 1.1404(m), but amend the rule to include an alternative where the parties are actually engaged in informal dispute resolution.

The Florida IOUs agree with the Commission's goal of promoting informal dispute resolution processes[129] but do not believe that stripping the 30-day deadline in Rule 1.1404(m) is the solution. In fact, this may inadvertently lead to more delays. The Florida IOUs suggest amending Rule 1.1404(m) to include an alternative that the potential complainant may file within 10 days of the cessation or termination of informal dispute resolution procedures, but not more than 60 days after the denial at issue. This approach encourages informal dispute resolution in lieu of formal complaints, but also ensures that formal dispute resolution proceedings, where necessary, are instituted in a timely manner. In cases where the potential complainant and/or respondent are not willing to employ informal dispute resolution, there is no need to extend the complaint filing deadline beyond 30 days.

To address these issues, the Florida IOUs propose the following revisions to proposed Rule 1.1404(m):

> In a case where a cable television system operator or telecommunications carrier claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. § 224(f), the complaint~~,~~ shall be filed within 30 days of such denial, or, in the alternative, within 10 days of the termination of unsuccessful or incomplete informal dispute resolution procedures regarding such denial, but in no event more than 60 days after such denial. ~~I~~In addition to meeting the other requirements of this section, the complaint shall include the data and information necessary to support the claim, including. . . .

B. The Proposed Expansion of Remedies Is Bad Law and Bad Policy

The Commission's proposed revisions to Rule 1.1410 are ill-conceived in almost every respect. The proposed revisions would foster unpredictability, encourage aggrieved attachers to sit on their claimed rights, usurp the role of the courts, and exceed the Commission's statutory

[129] *Id.*, ¶ 81.

authority. The Commission's proposed revisions address two different circumstances: (1) where the Commission determines that a rate, term or condition is not just and reasonable; and (2) where the Commission determines "that access to a pole, duct, conduit or right-of-way has been unlawfully denied or unreasonably delayed." The Florida IOUs address each of these circumstances separately below.

1. Rate, Term or Condition

Proposed Rule 1.1410(1)[130] would: (1) eliminate the Commission's long-standing limitation on the temporal scope of refunds (instead extending this period "consistent with the applicable statute of limitations"); and (2) allow the Commission to impose arbitrary "compensatory damages" arising out of a rate, term or condition found to be unjust and unreasonable. The FNPRM states: the "experience in handling pole attachment complaints leads us to believe that [the rule limiting refunds to the date of the complaint] fails to make injured attachers whole."[131] But the Commission offers no explanation to support this belief and does not cite to a single example or piece of evidence; the Commission does not even use a hypothetical example to support its extreme position.

The statute of limitations in Florida is five years for breach of contract claims[132] and four years for tort claims.[133] A complaint proceeding in the Commission challenging a rate, term or condition as unjust and unreasonable sounds neither in contract nor in tort. What is the "applicable statute of limitations"? If a state law statute of limitations applies, do other state law

[130] For the sake of consistency with its other rules, the Commission might consider making this Rule 1.1410(a), and changing sub-subparts (a), (b), (c) and (d) to sub-subparts (1), (2), (3) and (4) respectively.

[131] FNPRM, ¶ 88.

[132] Section 95.11(2)(b), Fla. Stats.

[133] Section 95.11(3), Fla. Stats.

concepts, such as the economic loss doctrine and the parole evidence rule, apply? These questions highlight the problems inherent in the Commission's proposed new approach. The Commission is trying to create a hybrid court-agency by cherry-picking concepts from both spheres that are most advantageous to communications attachers. This is neither fair nor necessary (especially given the dearth of factual support offered by the Commission for its proposal).

For example, under the Commission's proposal (and assuming a five year statute of limitations for the sake of discussion), a cable operator could pay a pole attachment rate set forth in the pole attachment agreement for five years without complaint, then on the last day of the fifth year file a complaint and seek a refund. If the refund sought was $1 per attachment, and the cable operator had 200,000 attachments,[134] the Commission's proposed rule would expose the electric utility to $1,000,000 in "refund" liability (excluding interest). This is an unacceptable contingency in an already volatile regulatory environment (where utilities are constantly wondering which provision of its long-standing contracts an attacher will next claim is unjust and unreasonable). The Commission's existing rule –imperfect as it is – at least discourages communications attachers from sitting on their claimed rights. Moreover, as the Commission notes in the FNPRM, it has the power to extend the refund period under special circumstances.[135]

The Commission's proposal to grant itself new "catchall" authority to award other compensatory damages arising out of a rate, term or condition found to be unjust and unreasonable is equally troubling. Who will determine these unspecified damages? How will

[134] This is not an uncommon number for a large attacher. FPL's largest attacher has over 518,000 attachments (Kennedy Decl. at ¶ 5); TECO's largest attacher has over 186,000 attachments (O'Brien Decl. at ¶ 4); PEF's largest attacher has approximately 302,500 attachments (Freeburn Decl. at ¶ 4).

[135] FNPRM, ¶ 84 n.231.

such determinations be made in the absence of clear guidelines? Will there be a hearing in every instance (which will necessarily delay, rather than speed, resolution)? How will the Commission ensure due process? These questions and others render the Commission's proposal fatally flawed. The Commission cites no evidence or actual examples (or even a request by a communications attacher, for that matter) to support this monumental policy shift. The hypothetical example cited by the Commission – where an attacher is forced to incur additional costs paid to third-party attachers due to restrictions on boxing – seems to be more of an "access" issue, rather than an issue involving a "rate, term or condition." If an attacher believes it is unlawfully being restricted from boxing, the proper remedy is to file a timely complaint proceeding for denial of access. The Commission's proposed revisions would encourage attachers to choose an alternative (perhaps without even voicing a complaint to the pole owner), then seek monetary damages years later based on faded recollections, lost documentation and possibly even dead witnesses.

Further, how could it be determined five years later whether, in fact, the attacher was wrongfully prohibited from boxing and whether the attacher's claimed damages were proximately caused by the prohibition? How would the Commission determine whether and to what extent the attacher sought to mitigate, or could have mitigated, its damages? For example, if the attacher could have chosen another route to accomplish the same objective, it would not be entitled to damages. But this determination would require reconstructing a "snapshot" of the infrastructure as it existed at the time of the attacher's decision. These are the types of issues that require significant document discovery and depositions. These possibilities definitely would not make the Commission's complaint procedure more efficient, but instead encourage *inefficiencies*.

In addition to the practical problems presented by a rule allowing the Commission to assess unspecified compensatory damages, there is also a *statutory* problem. Nothing in the Act gives the Commission authority to award compensatory damages. Instead, the Act articulates the Commission's authority as ensuring that the "rates, terms and conditions" or pole attachments are "just and reasonable." In the section of the Act addressing the Commission's authority to "enforc[e] any determinations resulting from complaint procedures," the only specifically enumerated remedy is "issuing cease and desist orders" – a remedy that sounds in *equitable* relief.[136] Had Congress intended for the Commission to award compensatory damages, it would have specifically said so.[137] The Florida IOUs support the arguments set forth by the Edison Electric Institute and the Utilities Telecom Council on this issue in part VII.A of their comments, and adopt those arguments as if fully set forth herein.[138]

2. Denial of Access

Proposed Rule 1.1410(2)[139] would: (1) allow the Commission to order that access to a pole be permitted within a specified time frame (1.1410(2)(a)); and (2) allow the Commission to award unspecified compensatory damages arising out of an access denial found to be unlawful. Though the Florida IOUs are skeptical about how the language of proposed Rule 1.1401(2)(a) would be applied, the language itself is acceptable and, as the Commission notes, in keeping with

[136] 47 U.S.C. § 224(b)(1).

[137] The Commission's "refund" rules are akin to the gain-based concept of restitution (equitable remedy) as opposed to the loss-based concept of compensation (legal remedy).

[138] This same argument applies to the Commission's proposal to award compensatory damages for denial of access, addressed in part III.B.2. below.

[139] Similar to note 130 above, and for the sake of consistency with its other rules, the Commission might consider making this Rule 1.1410(b), and changing sub-subparts (a) and (b) to sub-subparts (1)and (2), respectively.

the Commission's past practices.[140] The troubling part of proposed Rule 1.1410(2) is subpart (b), which would grant the Commission authority to award unfettered compensatory damages in the event a good-faith denial of access is later found to be unlawful. When coupled with the Commission's aggressive proposed access timeline, a proposed extension of the damages period "consistent with the applicable statute of limitations" (whatever that may be), and a proposal to abandon the 30-day rule for filing access denial complaints, proposed Rule 1.1410(2)(b) strikes no balance at all between the various stakeholders. It is completely one-sided, unnecessary, and out-of-step with both Commission precedent and the Commission's own statements in the FNPRM.

In support of proposed Rule 1.1410(2)(b), the FNPRM states:

> Because the current rule provides no monetary remedy for a delay or denial of access, utilities have little incentive to refrain from conduct that obstructs or delays access. . . . Currently, *a utility that competes with the attacher may calculate that the cost of defending an access complaint before the Commission, even it receives an adverse ruling, may be justified by the advantage the pole owner has gained by delaying a rival's build-out plans*.[141]

Thus, it appears the rule is intended to address rivals who compete with the requesting attacher. The Commission already has found this generally *not* to be the case for electric utilities: "[i]n the majority of cases, electric power companies and other non-incumbent LECs are typically disinterested parties with only the best interest of the infrastructure at heart."[142] If this rationale – which the Florida IOUs whole-heartedly endorse – justifies different treatment between electric utilities and ILECs in other portions of the Commission's proposed rules (such as the rules addressing use of outside contractors), it seems the same rationale should apply here.

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[140] FNPRM, ¶ 85.

[141] *Id.*, ¶ 86 (emphasis added).

[142] *Id.*, ¶ 68.

Moreover, the FNPRM suggests that the current rule is insufficient because the only consequence a utility faces is an "order requiring the utility to provide the access it was obligated to grant in the first place."[143] This suggests that access issues are simple and obvious. But access denials (and delays) are seldom easy matters of black and white. There are almost always legal nuances, factual complexities, important matters of safety and reliability, and fundamental rights of the pole owner in-play. A denial or delay of access might be based on good-faith differences of engineering opinion or even reasons beyond the utility's control.

3. Suggested Revision to Proposed Rule 1.1410

The Commission should leave the existing Rule 1.1410 intact as new sub-part (a) (rather than sub-part (1)). Subpart (2) should be changed to sub-part (b), and revised as follows:

> (b) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or ~~unreasonably~~ delayed, it may~~: (1) O~~order that access be permitted within a specified time frame and in accordance with specified rates, terms and conditions.~~; and (2) Order an award of compensatory damages, consistent with the applicable statute of limitations.~~

The term "unreasonably" should be deleted because the standard by which access issues are measured is the "nondiscriminatory" standard, not the "just and reasonable" standard. In any event, the term "unlawfully" is the only modifier needed.

Alternatively, and assuming for the sake of discussion the Commission has any authority to award compensatory damages (which it does not), the Commission should: (1) limit the ability to award compensatory damages to situations where access has been denied or delayed to gain competitive advantage; and (2) limit the time period of damages to the date of denial or the date by which access should have been granted under the Commission's proposed timeline. The Commission should also clarify that any provision extending a damages or refund period

[143] *Id.*, ¶ 86.

"consistent with the applicable statute of limitations" applies *prospectively* only. To allow (intentionally or inadvertently) retroactive application would upset settled business expectations and impose unanticipated contingent liabilities on electric utilities and their customers.

C. The Commission Should Allow Pole Owners to Enforce Contractual Provisions Designed to Deter Unauthorized Attachments

1. The Problem

The Florida IOUs appreciate the Commission's attention to unauthorized attachments in the FNPRM and agree with the Commission's observations that "the dangers presented by unauthorized attachments transcend the theoretical" and that "penalties amounting to little more than back rent may not discourage non-compliance with authorization processes."[144] The FNPRM also accurately states:

> True unauthorized attachments can compromise safety because they bypass even the most routine safeguards, such as verifying that the new attachment will not interfere with existing facilities, that adequate clearances are maintained, that the pole can safely bear the additional load, and that the attachment meets the appropriate safety requirements of the utility and the NESC.[145]

The Florida IOUs respectfully submit that *reliability* – a consideration that sometimes overlaps safety but often stands alone – is also an essential consideration in the context of unauthorized attachments. As set forth in the Florida IOUs initial comments, the primary purpose of the permitting process is to preserve the safety and reliability of the electric distribution system.[146]

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[144] FNPRM, ¶¶ 91 & 94. The Florida IOUs are still curious, though, as to why the Commission would refer to "back rent" as a "penalty" at all. Back-rent simply compensates the pole owner for what it should have been receiving in rent had the attacher followed the authorization process. This is similar to tax evasion. If the only consequence was payment of what already was owed, more people would evade taxes.

[145] *Id.*, ¶ 91.

[146] Initial Comments of Florida Power & Light, Tampa Electric, and Progress Energy Florida Regarding Safety and Reliability, WC Docket No. 07-245 (Mar. 7, 2008), at p. 11 ("The fundamental purpose of these processes is to allow the Florida IOUs an opportunity to 'pre-

Virtually all electric utility commenters in the underlying proceedings submitted comments and data regarding unauthorized attachments. Nonetheless, the Commission states in the FNPRM that it is "unable to gauge with certainty the extent of the problem of unauthorized attachments," as if to suggest the Commission is not quite convinced there is a problem worthy of a solution.[147] The FNPRM also indicates the Commission deems unauthorized attachment rates of 6.18% and 4.79% either low or insignificant.[148] The dangers of unauthorized attachments are clear, and the data show that they are a regular, recurring problem – there is no reason for the Commission to withhold action until pole owners demonstrate a pattern of severe consequences or uniform data.[149] As the Commission points out, "competitive pressure to bring services to market" likely is to blame for unauthorized attachments.[150]

To some extent, the problem of unauthorized attachments is one of the Commission's own making. Several decisions from the Enforcement Bureau have undermined an electric utility's right to enforce contractual provisions addressing unauthorized attachments.[151] Section

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engineer' for the attachment in order to preserve the safety and reliability of the distribution system.").

[147] FNPRM, ¶ 91.

[148] *Id.*, ¶ 89. The unauthorized attachment rates of 6.18% and 4.79% were from Progress Energy and Xcel, respectively. Progress Energy and Xcel reported third-party attachment totals of 925,511 and 316,177 respectively in their comments, meaning the actual numbers of unauthorized attachments on their respective systems were 57,170 and 15,142. Comments of American Elec. Power Serv. Corp., Duke Energy Corp., Entergy Servs. Co., PPL Elec. Utilities Corp., Progress Energy, Southern Co., and Xcel Energy Servs. Inc., WC Docket No. 07-245 (Mar. 7, 2008), at pp. 16, 18. The Florida IOUs submit that neither of these figures is low or insignificant

[149] The Commission's proposed changes to the make-ready process are not based on any particular data about the incidence or commonality of the alleged make-ready delays – let alone hundreds of thousands of pieces of data such as is the case with unauthorized attachments.

[150] *See* FNPRM, ¶ 94.

[151] *See, e.g.*, *In re Mile Hi Cable Partners, LP. v. Public Serv. Co. of Colorado*, 17 FCC Rcd. 6268, ¶ 10 (2002) (discussing penalties for unauthorized attachments and stating that "there

224 attachers are keenly aware of these decisions, and stand ready to string cite them any time an electric utility sends a bill for unauthorized attachments. This often results in the electric utility either (a) abandoning its rights (surmising Commission resolution of the issue is *a fait accomplit* in favor of the attacher), or (b) negotiating a reduced amount, which hardly serves as a deterrent (attachers also regularly cite *Mile Hi* for the proposition that contractual interest rates above the IRS underpayment rate are unenforceable). Not surprisingly, this worn-out song and dance emboldens unauthorized attachers and helps perpetuate the problem.

2. The Solution

The solution to the unauthorized attachment problem is for the Commission to decline the invitation to interfere with an electric utility's enforcement of its pole license agreements. Many pole attachment agreements already provide negotiated provisions that specifically address unauthorized attachments. These provisions require payment of back rent (plus interest), payment of penalties, or some combination of the two. For example, PEF's and Gulf's pole attachment agreements require, upon discovery of unauthorized attachments: (l) payments of back rent, plus interest; and (2) a $25 fee for each unauthorized attachment in excess of ten attachments or 2% of the last verified total number of attachments (whichever is greater).[152] This 2% "forgiveness" provision prevents attachers from paying a penalty charge merely because of perceived minor counting discrepancies. Notwithstanding the clear terms of the agreements,

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is no basis in the record to support a conclusion that Respondent is entitled to exemplary or punitive damages beyond compensatory damages"); *see also Salsgiver Commc'ns, Inc. v. North Pittsburgh Telephone Co.*, Memorandum Order and Opinion, EB-06-MD-004, ¶ 28 (Nov. 26, 2007) ("*Salsgiver*") (holding that a $250 unauthorized attachment penalty was unreasonable and limiting recovery for unauthorized attachments to compensatory damages); *Cable Television Association of Georgia, et al. v. Georgia Power Co.,* 18 FCC Rcd 16333, ¶¶ 21-22 (2003) ("CTAG") ("We find the New Contract's unauthorized attachment fee to be unreasonable in several respects.").

[152] Freeburn Decl. at ¶ 14; Bowen Decl. at ¶ 12.

both PEF and Gulf have been forced to negotiate a reduction in unauthorized attachment charges within the past four years due to the looming presence of the Commission's precedent.[153]

Some entities have argued that imposing penalties for unauthorized attachments violates contract law principles. That argument seems to concede the very point the Florida IOUs are making – that contract law, and not Commission policy, should govern this problem. If the Commission is serious about addressing unauthorized attachments, it should start by vacating the *Mile Hi*, *Salsgiver*, and *CTAG* decisions (or at least the portions addressing unauthorized attachments) all of which blunt the effectiveness of meaningful contract provisions.

Though Commission-imposed unauthorized attachment penalties likely would mitigate the problem, the Florida IOUs believe the more efficient approach is to allow the contracts to govern, and for the parties to seek resolution in the courts, which are best equipped to handle contract disputes.[154] After an adequate period of time has passed to determine how this contract-based approach affects the problem of unauthorized attachments, the Commission could then consider whether it should assume additional administrative burden in the form of a penalty scheme.[155] As described above, many pole attachment agreements already have done the heavy

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[153] *Id.*

[154] This approach would also obviate the need for changes to the existing complaint procedures. *See* FNPRM, ¶ 97.

[155] For instance, the Oregon system referred to in the FNPRM does not simply provide a penalty for unauthorized attachments; it also provides a procedure requiring notice of unauthorized attachments, what that notice must include, timelines for correction, what a plan of correction must include, reimbursement for utility expenses if any are required to correct the problem, and so on. *See* OAR 860-028-0060, 860-028-0120, 860-028-0130, 860-028-0140, 860-028-0160 through 860-028-0190 (current through June 15, 2010). While the Florida IOUs do not disagree with the idea of a penalty provision similar to Oregon's in theory, this is a significant administrative undertaking for a problem that likely will be as easily solved by allowing pole owners to enforce their contracts.

lifting with respect to most of the concerns raised by attachers (notice, record-keeping, thresholds, etc.). These agreements need only be enforced without Commission interference.[156]

D. The Proposed Revisions To The "Sign and Sue" Rule are a Step in the Right Direction, But Require Further Refinement

1. The Proposed Written Notice Requirement in Rule 1.1404(d) Needs Further Refinement

Though the Florida IOUs continue to believe state law should govern the enforceability of executed contracts, the Commission's proposed "written notice" revision to the "sign and sue" rule is definitely a step in the right direction. The Florida IOUs respectfully request that the Commission take one additional step (explained herein) to prevent unscrupulous attachers from thwarting the intent of the rule.

The Commission's proposed rule "add[s] a requirement that an attacher provide a utility with written notice of objections to a provision in a proposed pole attachment agreement, during contract negotiations, as a prerequisite for later bringing a complaint challenging that provision," but does not establish requirements on the time, form or content of such written notice.[157] This lack of specificity could encourage attachers to either bury objections deep within the overall context of negotiations, or provide blanket objections that afford no meaningful opportunity for resolution.

For example, Gulf recently concluded negotiations for new pole attachment agreements with all cable operators in its service territory. The negotiations lasted more than 12 months, and included the exchange of multiple draft agreements, numerous pieces of correspondence, three face-to-face meetings between the negotiation teams, and countless verbal exchanges which all

[156] *See also* Initial Comments of FPL, TECO, and PEF Regarding Safety and Reliability, WC Docket No. 07-245 (Mar. 7, 2008), at 11; Reply Comments of FPL, TECO, and PEF, WC Docket No. 07-245 (April 22, 2008), at 6-7.

[157] FNPRM, ¶ 107; FNPRM Appendix B, ¶ 4.

contained – to varying degrees – both sides' objections to various language proposals, some of which ultimately became part of the final, executed agreements. Gulf invested substantial resources and personal capital in the negotiations.[158] Under the Commission's proposed "sign and sue" revisions, even though Gulf views the provisions of the final agreement as an inextricably intertwined package of rights negotiated in good faith by both sides, Gulf nonetheless could be faced with a complaint alleging *facial* unreasonableness based on some sort of "written notice" given midway through the negotiations.

This hypothetical example reveals the shortcomings of the Commission's proposed rule, which will simply encourage attachers to word all correspondence in negotiations to include language that could later be deemed "notice" under the rule. Meanwhile, the utility gets no meaningful notice as to which provisions are seriously considered to be in violation of section 224 in the context of the entire agreement. This approach also puts the Commission in the position of sorting through the history of the parties' negotiations to determine whether the "notice" preceded some other concession, and therefore is mooted by the "bargained-for package of provisions."[159] This kind of fact-intensive investigation is time-consuming, expensive, inefficient and unnecessary.

The Florida IOUs instead suggest that the Commission require an attacher to *specifically* designate – immediately before the agreement is executed by either party – the provisions of the final agreement it contends are unjust and unreasonable. This solves the problem of dredging up months-old negotiations, and also gives the parties a final opportunity to resolve the disagreement (which is consistent with the Commission's stated preference for negotiated resolutions to disputes). The utility will have an incentive to reconsider the provision(s) because

[158] Bowen Decl. at ¶ 11.

[159] FNPRM, ¶ 106.

it has just been put on notice the attacher already foresees the possibility of a complaint, while the attacher will be required to designate only those provisions it actually believes are unjust and unreasonable (rather than employing blanket notice or padding all of its correspondence during negotiations).

The Commission's enforcement of section 224 should not encourage a game of hide-the-ball. The only reason an attacher should fear the designation requirement suggested by the Florida IOUs is if that attacher wishes to keep the utility in the dark, or wishes to retain the right to challenge any provision it later chooses. This does not appear to be the intent of the Commission's proposed revisions to the "sign and sue" rule.

2. The Proposed Exception To The Written Notice Requirement Should Be Deleted From Rule 1.1404(d)

The Commission's proposed revisions to the "sign and sue" rule also include an exception to the written notice requirement "where the complainant establishes that the rate, term, or condition was not unjust and unreasonable on its face, but only as applied by the respondent, and it could not reasonably have anticipated that the challenged rate, term, or condition would be applied or interpreted in such an unjust and unreasonable manner."[160] The Florida IOUs encourage the Commission to delete this exception. This exception would have the unintended effect of rendering the written notice requirement meaningless. It would encourage an attacher to remain silent at the "written notice" stage, but later claim it never anticipated a particular application of the provision. The exception might also encourage consequence-driven challenges to facially reasonable provisions, even though the consequences of a facially reasonable provision (whether financial or operational) should not impair the enforceability of the provision. The real issue is whether the pole owner is enforcing the terms of the agreement

[160] FNPRM, Appendix B, ¶ 4.

as written.[161] State law already provides at least two remedies for this: (1) an action for breach of contract; and (2) an action to enforce the terms of the contract.[162]

3. Suggested Revisions to Rule 1.1404(d)

To accommodate the concerns raised above, the Florida IOUs propose the following revisions to the Commission's proposed revision of Rule 1.1404(d):

> The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility. If the complainant contends that a rate, term, or condition in an executed pole attachment agreement is unjust and unreasonable, it shall attach to its complaint evidence documenting that the complainant, immediately prior to executing the pole attachment agreement, ~~provided written notice to the respondent, during negotiation of the agreement, that the complainant considered the rate, term, or condition unjust and unreasonable, and the basis for that conclusion.~~ designated in writing the particular rate, term, or condition as subject to a Rule 1.1404(d) complaint, directly referring to the text of the pole attachment agreement in its final form. Proof of such ~~notice~~ designation to the respondent shall be a prerequisite to filing a complaint challenging a rate, term, or condition in an executed agreement~~, except where the complainant establishes that the rate, term, or condition was not unjust and unreasonable on its face, but only as applied by the respondent, and it could not reasonably have anticipated that the challenged rate, term, or condition would be applied or interpreted in such an unjust and unreasonable manner~~. The designation must also state the factual and

[161] Section 224 attachers prefer to cast this issue as whether a pole owner is enforcing the terms of an agreement "reasonably." The reason for this is clear: attachers prefer to mask even the most basic contract dispute as a dispute regarding the "reasonableness" of the contract because they prefer the Commission's policy-driven adjudication over the balanced hand of state court adjudication.

[162] Leaving issues of contract interpretation to state courts lessens the administrative burden on the Commission, and places such disputes in forums accustomed to adjudicating these precise issues. *See generally* Restatement (Second) of Contracts §§ 201, 204 (1979) ("Where the parties have attached different meanings to a promise or agreement or a term thereof, term…, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party. Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent….When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.").

legal basis for complainant's contention that the rate, term, or condition is unjust and unreasonable. . . .

These suggested changes would further the Commission's intent for pole owner's to receive fair notice of disputed terms, while at the same time respecting the limits of the Commission's adjudicatory jurisdiction to hearing complaints for purposes of determining whether rates, terms and conditions – as written – are just and reasonable.

IV. COMMENTS ON PROPOSED CHANGES TO THE TELECOM RATE AND THE RENEWED INQUIRY INTO JOINT USE AGREEMENTS

A. The Proposed Changes to the Telecom Rate Formula Are Unlawful, Unreasonable and Inconsistent With Over a Decade of Regulation

The Commission proposes to "reinterpret" the telecom rate by removing the depreciation, tax, and rate of return components from the carrying charge.[163] The Commission's proposal is based on concerns that the difference between the cable and telecom rate "has resulted in rate disparities and disputes over which formula applies and impacted communications service providers' investment decisions."[164] Though the different rate formulas established by sections 224(d) and (e) most certainly result in rate disparities and disputes over which formula applies, it is disingenuous – if not an inexcusable misrepresentation – for *any* communications provider to assert its investment decisions have been meaningfully impacted by the difference between the cable and telecom rates. The only type of communications providers who could *possibly* be impacted by the difference are cable operators. What services have cable operators been deterred from providing? From all it appears, cable operators are offering services identical to their competitors, but with the benefit of lower pole attachment rates. If telecom providers are being deterred from making investment due to pole attachment rates, it can only be the result of

[163] FNPRM, ¶ 130.

[164] *Id.*, ¶¶ 122, 130.

the subsidy enjoyed by their competitors. The Commission can and should solve this problem by requiring cable operators and telecom providers offering identical services to pay the telecom rate. This approach not only would be consistent with section 224, but also would be consistent with the Commission's original plan to raise the rate paid by cable operators who offer broadband.[165]

The Commission's proposed reinterpretation of the telecom rate starts from the "zone of reasonableness" approach, under which the Commission identifies the upper and lower bound rates that can constitute a "just and reasonable" rate.[166] The upper bound rate, according to the Commission, is the telecom rate as currently implemented.[167] The Commission then manufactures a lower bound rate by changing the methodology used for determining the costs a utility can recover under the telecom rate. Finally, the Commission proposes that the utility charge either the lower bound telecom rate or the cable rate (whichever is higher).[168] This approach violates the plain language of the statute and represents a sharp departure from more than a decade of regulation. Notwithstanding multiple rulemakings and other opportunities to

[165] Notice of Proposed Rulemaking, 22 FCC Rcd 20195, ¶ 36 (Nov. 20, 2007) ("[W]e conclude that the rate should be higher than the current cable rate, yet no greater than the telecommunications rate."). The Commission reversed course in the FNPRM on grounds that "increasing cable operators' rates – potentially up to the level yielded by the current telecom formula – would come at the cost of increased broadband prices and reduced incentives for deployment." (FNPRM, ¶ 118). As set forth above, cable operators cannot credibly claim they are making deployment decisions based on recurring pole attachment rentals. The notion that broadband prices would increase if pole attachment rentals increase is confounding. Cable operators -- the only broadband providers who stand to lose economic ground -- are not rate of return regulated. An added expense of production does not necessarily mean an increase cost in the price of the good. If it is the cable operators' *profits* that concern the Commission, the Florida IOUs (which *are* rate of return regulated) would respectfully urge the Commission to give equal consideration to the impact of its proposal on electric utility customers and shareholders.

[166] FNPRM, ¶ 129.

[167] *Id.*, ¶ 132.

[168] *Id.*, ¶ 141.

raise the issue, the Commission has *never* postulated that the "costs" allocated in the telecom rate formula might be different than the costs allocated in the cable rate formula.[169]

The Florida IOUs support the Commission's goal of unifying the pole attachment rates for all section 224 attachers providing identical services over identical attachments. The Florida IOUs respectfully suggest that applying the current telecom rate to all attachers, with some minor modifications, will achieve the Commission's goal of eliminating disparity among broadband attachers in a manner consistent with section 224.[170]

1. The Proposed Reinterpretation Violates the Plain Language of section 224

The plain language of the Act clearly provides a *different* rate in section 224(e), as compared to section 224(d). Not only are the differences apparent in the rates themselves, but section 224(d)(3) expressly states that "[u]ntil the effective date of the regulations required under subsection (e) of this section, this subsection [(d)] shall also apply to the rate for any pole attachment used…to provide telecommunications service." The Act also expressly contemplates that the section 224(e) rate formula would yield higher rates than section 224(d) where it states:

> Any increase in the rates for pole attachments that result from the adoption of the regulations required by [subsection (e)] shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.[171]

The courts have noted this statutory difference as well. In *Alabama. Power Co. v. FCC*, the Eleventh Circuit stated: "the Telecom Rate provided in 47 U.S.C. § 224(e) yields a higher rate

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[169] *See infra* note 195 (quoting six different Commission orders or proposed rulemakings all defining costs to include a rate of return, depreciation, and taxes as included in the cable rate).

[170] *See* Initial Comments of Florida Power & Light and Tampa Electric Regarding ILECs and Pole Attachment Rates, WC Docket No. 07-245 (Mar. 7, 2008), at pp. 11-17.

[171] 47 U.S.C. § 224(e)(4).

for telecommunications attachments than the Cable Rate provides for cable attachments."[172] The Commission likewise has determined this to be the intent of the Act. In *Alabama Cable Telecomms. Assoc. v. Alabama Power Co.*, the Commission stated: "Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates."[173] The Commission has even gone a step further, specifically determining that Congress *intended* for 224(e) to yield a rate higher than 224(d): "Because the rate for cable television attachments satisfies the constitutional minimum of 'just compensation,' *Congress's determination that other pole attachers should pay a higher rate* is indeed irrelevant."[174]

The Commission's new telecom rate proposal is based on the premise that requiring different rates (particularly a higher rate) for different types of attachers was a bad idea.[175] Even if that premise was correct, it is not up to the Commission to make a change. The Commission cannot implement the statute in a way contrary to the clear language of the Act. Such decisions are squarely within the purview of Congress:

> This is not a case about whether additional or different regulations are needed to address legitimate concerns…. At its core, this case is about who has the power to make this type of major policy decision. As the Supreme Court has previously stated about a different agency and its enabling statute, neither federal agencies nor the courts can substitute their policy judgments for those of Congress. … Accordingly, we do not, indeed cannot, pass judgment on the merits of the regulatory scheme proposed by the [agency]. By its ultra vires action, the [agency] has exceeded the authority granted to it by Congress, and its rulemaking action cannot stand.[176]

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[172] 311 F.3d at 1371 n. 23.

[173] 16 FCC Rcd 12209, 12231 (2001).

[174] Commission Brief in Opposition to Cert at 18, *Alabama Power Co. v. FCC*, 540 U.S. 937 (2003) (denying cert) (No. 02-1474) (emphasis added) (attached as Exhibit F).

[175] *See* FNPRM, ¶¶ 115-16.

[176] *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 176 (4th Cir. 1998) (citations omitted).

An agency's policy preferences cannot trump the words of the statute.[177]

2. The Proposed Reinterpretation is Contrary to Legislative Intent

Assuming for the purposes of argument that the plain language of the Act did not bar the Commission's proposed new telecom rate, the reinterpretation still would be outside the Commission's statutory authority because it is contrary to the legislative intent underlying section 224(e). The Commission proposes a cost-causation theory, namely that the utility recover based on what costs the attacher causes:

> With respect to other capital costs, we believe it is likely that the attacher is the 'cost causer' for, at most, a *de minimis* portion of these costs. It is likely that most, if not all, of the past investment in an existing pole would have been incurred regardless of the demand for attachments other than the owner's attachments."[178]

In contrast to the Commission's cost-causation methodology, the legislative history makes clear that the telecom rate was intended to fully allocate costs (not to employ cost-causation methodology). Commenting on the language ultimately included as section 224(e), the Conference Report states: "The new provision directs the Commission to regulate pole attachment rates based on a "fully allocated cost" formula."[179] In fact, the Commission has previously stated, "[t]he end result of the application of the telecommunications pole attachment formula is a rate which reflects the fully allocated costs of the pole-related expenses."[180] The premise behind *full allocation* is that the utility recovers the costs it incurs based upon the *benefit*

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[177] *Nat'l Treasury Emples. Union v. Chertoff*, 452 F.3d 839, 856, 864-65 (D.C. Cir. 2006) ("An agency construction of a statute cannot survive judicial review … if a contested regulation reflects an action that is inconsistent with the agency's authority. It does not matter whether the unlawful action arises because the disputed regulation defies the plain language of a statute or because the agency's construction is utterly unreasonable and thus impermissible." (emphasis added)).

[178] FNPRM, ¶ 135.

[179] H. REP. NO. 104-458 (1996) (Conf. Rep. on S. 652).

[180] *In re Ala. Cable Telecomms. Assoc.*, 16 FCC Rcd 12209, 12231 (2001).

an attacher receives from the pole, not based on what costs the attacher causes. As Congress correctly noted "the entire pole … is of equal benefit to all entities".[181] There is an irreconcilable contradiction between Congress' prescribed "beneficiary" methodology and the Commission's proposed cost-causation methodology.

The Commission's cost-causation approach also focuses on the costs associated specifically with *the attachment*.[182] To the contrary, Congress intended costs to be premised on the cost associated with the *pole* itself. In subsection (e)(2), the phrases actually used are "the cost of providing *space* on a pole…other than the usable *space*" and "the costs of providing *space* other than the usable *space*." In subsection (e)(3), the phrase used is "the cost of providing usable *space*." In section 224(e) the key term modifying "cost" undoubtedly is "space". Section 224(d) informs the meaning of this terminology. The language in section 224(d)(1), "the additional costs of providing pole attachments," speaks to the low-end of the cable rate spectrum (marginal costs). Section 224(d) sets the cable rate's higher bound rate, however, by taking "the sum of the operating expenses and actual capital costs of the utility *attributable to the entire pole*" and multiplies that amount by "the percentage of the total usable space … which is occupied by the pole attachment."[183] Section 224(d)'s higher bound rate lists the factors included in determining costs attributable to the pole itself (in other words, the cost of "space"), as compared to the lower bound rate determined by additional costs caused by the attachment.

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[181] H. REP. NO. 104-458 (1996) (Conf. Rep. on S. 652) (emphasis added).

[182] FNPRM, ¶ 133 ("Instead, some definition of 'costs' somewhat above incremental cost would need to be used so that when those costs are allocated pursuant to the 224(e) formula, the resulting pole rental rate would allow the utility to recover the incremental cost *associated with attachment*." (emphasis added)).

[183] 47 U.S.C. § 224(d)(1) (emphasis added).

Section 224(e), in referring to "space on a pole" was clearly referencing costs attributable to the pole itself, as opposed to costs associated directly with or caused by the attacher, and was intended to encompass all of the listed costs associated with the pole itself. Nothing in the text of the statute or the legislative history gives any support for the notion that Congress intended to alter the costs associated with a pole, as previously set forth in section 224(d).

In fact, the legislative history indicates that section 224(e)'s rate was intended to encompass the full cost of "space on pole" -- not just the space attributable or necessary for attachments:

> The new provision directs the Commission to regulate pole attachment rates based on a "fully allocated cost" formula. In prescribing pole attachment rates, the Commission shall: (1) recognize that *the entire pole*, duct, conduit, or right-of-way other than the usable space is of *equal benefit* to all entities attaching to the pole and therefore apportion the *cost of the space other than the usable space* equally among all such attachments; (2) recognize that the usable space is of proportional benefit to all entities attaching to the pole, duct, conduit, or right-of-way and therefore apportion *the cost of the usable space* according to the percentage of usable space required for each entity;[184]

The term "cost of providing space on a pole," as explained by the legislative history and informed by the text of section 224(d), can only be read to include all expenses attributable to the pole. Congress understood that utilities would build poles regardless of attachers, but also understood that attachers benefited from the poles despite the utility's motivation for building them.

Finally, the Commission's attempt to seize upon a perceived ambiguity in the term "cost" as used in section 224(e) is a non-starter, since it presumes Congress drafted § 224(e) in ignorance of the Commission's 15+ year history of interpreting the costs associated with poles under section 224(d) to include administrative, maintenance, depreciation, taxes, and a rate of

[184] H. REP. NO. 104-458 (1996) (Conf. Rep. on S. 652) (emphasis added).

return. In fact, given the settled use of these factors in pole attachment ratemaking, Congress is presumed to have adopted them, since as stated above, there is no apparent intent to alter that understanding of "cost". "In construing a statute, courts 'presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.' This includes knowledge of applicable administrative regulations."[185]

3. The Proposed Reinterpretation of the Telecom Rate is Based on Unreasonable Methodology

Even if the term "cost" as used in section 224(e) is ambiguous, the Commission's proposed reinterpretation of the telecom formula is unreasonable methodology and would amount to arbitrary and capricious agency decision-making. The Commission explains the foundation of its proposed new telecom rate by explaining that, because the word "cost" is ambiguous, there is a range of rates which meets the statutory language of the telecommunications rate and is just and reasonable.[186] Though the range of reasonableness approach is not inherently unreasonable, the Commission errs by artificially manufacturing the lower-bound rate.

For purposes of determining the lower-bound telecom rate, the Commission interprets the allegedly ambiguous term "cost" in section 224(e) to exclude both capital costs and taxes, since

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[185] *Wilderness Watch v. United States Forest Service*, 143 F. Supp. 2d 1186, 1205 (D.Mont. 2000) (quoting *United States v. Hunter*, 101 F.3d 82, 85 (9th Cir. 1996) (quoting *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-5 (1988) and citing *Marchese v. Shearson Hayden Stone, Inc.*, 822 F.2d 876, 878 (9th Cir. 1987) ("Congress may choose to address this question directly in the future, but for now it is proper for this court to presume that Congress was aware of the existing administrative regulations and interpretations each time it reauthorized the Act.")); s*ee also, e.g., FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 157 (2000) (explaining that "consistency of the [agency's] prior position is significant" because it "provides important context to Congress' enactment").

[186] FNPRM, ¶ 128.

those costs are not actually caused by attachers.[187] The Commission requests comment on "whether the exclusion of capital costs from the lower bound telecom rate under this approach is consistent both with principles of cost causation and the existing section 224 framework."[188] As discussed extensively in parts IV.A.1 and A.2 above, section 224(e)'s provisions do not support any interpretation that limits recovery based on "cost causation" or any recovery that is not "fully allocated." Because the Commission's methodology itself is unreasonable, the fact that the rate which results might conceivably be acceptable would not correct the problem.[189] "The Commission's action is to be judged on the basis of the reasonableness of the method it used to compute the pole attachment rate; we do not look merely to whether the ultimate result fell within the range allowed by statute."[190]

Not only is the lower-bound rate unreasonable because it violates legislative intent, but it also is unreasonable because it represents an unjustified departure from the Commission's historic methodology and from generally understood ratemaking principles. This sudden change in Commission policy represents a departure from long-standing past practice, which the Commission acknowledges.[191] "[T]he requirements that an agency explain its departure from

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[187] *Id.*, ¶¶ 135-37.

[188] *Id.*, ¶ 136.

[189] *Texas Power & Light Co. v. FCC*, 784 F.2d 1265, 1267-69 (5th Cir. 1986) ("The Commission argues at the outset that any error committed by it in fixing the rate is presumptively harm-less because (1) the statute requires only that pole attachment rates fall within a zone of reasonableness, and (2) the total rate fixed in this case has not been shown to be outside that zone, that is, to be either unjust or unreasonable. The same argument was made to the District of Columbia Circuit and was rejected …. The reason the argument fails is obvious. The Commission is not permitted to 'luck out' with respect to its decision to set a certain rate; it may not arbitrarily choose any figure within the ephemeral zone of reasonableness and set the rate there. Rather, what the Act requires, read in conjunction with the Administrative Procedure Act, is that the Commission reach a rational decision through rational means." (citation omitted)).

[190] *Id.* at 1267.

[191] FNPRM, ¶ 130.

precedent, and adequately explain the rationale of its decision, are prerequisites to a judicial finding that an agency's action is not arbitrary and capricious."[192] The Commission's heretofore undiscovered statutory interpretation has not been reasonably explained in terms consistent with the statute, and would not withstand judicial scrutiny. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."[193] In order to be reasonable, the agency's explanation for the changed interpretation must explain how the interpretation is consistent with the statute.[194]

The Commission has also historically given a consistent meaning to the "carrying charge" element of telecom and cable rates. The Commission has consistently described the carrying charge element of the cable and telecom rates to include "the utility's administrative, maintenance, and depreciation expenses, a return on investment, and taxes."[195] Likewise, the

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[192] *McHenry v. Bond*, 668 F.2d 1185, 1193 (11th Cir. 1982).

[193] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (citing *Watt v. Alaska*, 451 U.S. 259, 273 (1981)); *see also Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. at 446, n.30).

[194] *See Rust v. Sullivan,* 500 U.S. 173, 187 (1991) (citing the agency's finding that "the new regulations [were] more in keeping with the original intent of the statute"); *Good Samaritan*, 508 U.S. at 417-18 ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due….In the circumstances of this case, where the agency's interpretation of a statute is *at least as plausible as competing ones*, there is little, if any, reason not to defer to its construction. We should be especially reluctant to reject the agency's current view which, as we see it, *so closely fits the design of the statute as a whole and its object and policy*." (citations omitted) (emphasis added)).

[195] *In re Amendment of Rules and Policies Governing Pole Attachments* (Notice of Proposed Rulemaking) 12 FCC Rcd 7449 (1997) ("The final component of the overall pole attachment formula is the carrying charge rate. Carrying charges are the costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments. The carrying charges include the utility's administrative, maintenance, and depreciation expenses, a return on investment, and taxes. To help calculate the carrying charge rate, we developed a formula that relate each of these components to the utility's net investment."); *see also In re Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the*

well-known fundamental principles of utility ratemaking state that a just and reasonable rate will allow for both operating expenses and capital costs, including a rate of return.[196] This basic understanding of ratemaking principles extends to other agencies with similar authority to the Commission,[197] as well as state regulatory commissions.[198] Because the Commission's

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Commission's Rules and Policies Governing Pole Attachments (Notice of Proposed Rulemaking), 12 FCC Rcd 11725 (1997) ("Carrying charges are the costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments. The carrying charges include the utility's administrative, maintenance, and depreciation expenses, a return on investment, and taxes. To help calculate the carrying charge rate, we developed a formula that relate each of these components to the utility's net investment."); *In re Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments* (Report and Order), 13 FCC Rcd 6777 (1998) ("Carrying charges are the costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments. The carrying charges include the utility's administrative, maintenance, and depreciation expenses, a return on investment, and taxes. To help calculate the carrying charge rate, we developed a formula that relate each of these components to the utility's pole investment.").; *In re Amendment of Rules and Policies Governing Pole Attachments* (Report and Order), 15 FCC Rcd 6453 (2000) ("The carrying charge rate reflects those costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments. The elements of the carrying charge rate are: administrative, maintenance, depreciation, taxes and cost of capital (rate of return). ... Carrying Charge Rate = Administrative + Maintenance + Depreciation + Taxes + Return"); *In re Amendment of Commission's Rules and Policies Governing Pole Attachments; In re Implementation of Section 703(e) of the Telecommunications Act of 1996* (Consolidated Partial Order on Reconsideration), 16 FCC Rcd 12103 (2001) ("Carrying charges are the costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments. The carrying charges include the utility's administrative, maintenance, and depreciation expenses, a return on investment, and associated income taxes."); *In re Implementation of Section 224 of the Act* (Notice of Proposed Rulemaking), 22 FCC Rcd 20195 (2007) ("Carrying charges are an attacher's share of the utility's fully allocated costs of owning a pole, including administration, taxes, cost of capital, depreciation and maintenance utilized.") (citations omitted throughout).

[196] The Commission itself noted this in the FNPRM, ¶ 126 n.345 (citing CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES 176-80 (1993)).

[197] Although the specifics of the formula have been tweaked over the years, the Federal Energy Regulatory Commission's seminal case on oil pipeline rates includes both operating and capital expenses, as well as a reasonable rate of return. Order No. 154-B, 31 FERC ¶ 61,377, 61,832-33 (1985) ("The purpose in Phase I of this proceeding is to devise generic principles for the setting of just and reasonable oil pipeline rates. One essential ingredient in this task is to adopt rate base and rate of return methodologies which will operate together to produce a just and reasonable return allowance. In making this determination the Commission must also

unprecedented departure from its own and generally understood ratemaking principles to create this "lower bound" rate has only been explained by citing cost-causation principles barred by the Act, the proposed lower bound rate would not withstand judicial scrutiny.

B. The Florida IOUs Propose an Alternative to the Commission's Proposed Lower-Bound Rate

The Commission seeks comment on "alternative proposals for determining a lower bound telecom rate."[199] The Commission's current telecom rate formula already provides a lower bound rate, and cannot realistically be employed as the upper bound rate. The current telecom rate, applied to all section 224 attachers offering identical services over identical attachments, would correct any harmful disparities. The Commission need not "reinterpret" the telecom rate to achieve this end.

The current telecom rate already hovers at the lower bound of reasonableness because it relies on unrealistic presumptions. As the Florida IOUs previously have addressed, the current presumptions for the amount of common ("unusable") space and the average number of attaching entities do not square with actual data.[200] By excluding the safety space necessary for communications workers from the definition of "usable space" and by employing an average number of attachers that is substantially higher than the norm, the current telecom rate already is

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determine the proper method for computing the tax expense component of an oil pipeline's cost-of-service. . . .").

[198] *See, e.g.* Section 366.06, Fla. Stats. ("[T]he commission shall have the authority to determine and fix fair, just, and reasonable rates that may be ... collected by any public utility for its service."). The Florida Supreme Court has stated that "[a] regulated public utility is entitled to an opportunity to earn a fair or reasonable rate of return on its invested capital. *Gulf Power Co. v. Bevis*, 289 So.2d 401 (Fla. 1974)." *United Tel. Co. v. Mann*, 403 So. 2d 962, 966 (Fla. 1981).

[199] FNPRM, ¶ 139.

[200] *See* Initial Comments of Florida Power & Light and Tampa Electric Regarding ILECs and Pole Attachment Rates, WC Docket No. 07-245 (Mar. 7, 2008), at pp. 14-16. The Florida IOUs adopt and incorporate these previous comments regarding the telecom rate herein.

artificially low. The Florida IOUs propose that the Commission correct these presumptions in the telecom rate, and employ this corrected rate as the lower bound rate.

C. The Commission Cannot End-Run Section 224(e) Through Forbearance

Recognizing the potential problems with its proposed reinterpretation of the telecom rate, the Commission also asks whether it would be possible "to forbear from applying the section 224(e) telecom rate, and adopt a different rate—such as the cable rate—pursuant to section 224(b)."[201] The answer is "no." Forbearance is intended for those regulations that impose a *burden* on the telecom carrier – not for those regulations, like section 224(e), that vest *rights* in a telecom carrier. The Commission's authority is to forbear "from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services."[202] As the Commission correctly observed in the June 17, 2010 Broadband Regulation Notice of Inquiry, section 224 imposes a burden on the *utility* to allow access within specified rates, and on the *Commission* to enact regulations – it confers a right on telecommunications carriers, not a burden.[203] The entity being

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[201] FNPRM, ¶ 142.

[202] 47 U.S.C. § 160. *See New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 1114 n.52 (9th Cir. 2006) ("47 U.S.C. § 160(a) allows the FCC regulatory flexibility to forbear "from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services' where the FCC determines that *enforcement* is not necessary to protect consumers or serve the public interest." (emphasis added)).

[203] *In re Framework for Broadband Internet Service* (Notice of Inquiry), FCC 10-114, GN Docket No. 10-127 at ¶ 87 (June 17, 2010) ("We ask whether section 10 provides authority to forbear from provisions of the statute that do not directly impose obligations on carriers. For example, section 224 provides the framework for the Commission's regulation of pole attachments, including the rates therefor. Does section 10 provide the Commission authority to forbear from section 224 insofar as it imposes rate-related obligations on the Commission and utilities that own poles, rather than on telecommunications carriers or telecommunications services?").

regulated by section 224 is the utility, not the telecommunications carrier.[204] Even some communications attachers are skeptical of the Commission's authority to forbear application of section 224 as a means of circumventing the telecom rate.[205]

Moreover, forbearance is plainly inapplicable to the rate provision in section 224(e). In order to forbear, the Commission must find that "enforcement of [section 224(e)] is not necessary to ensure that the charges … for, or in connection with," telecommunications attachments "are just and reasonable and are not unjustly or unreasonably discriminatory."[206] Congress already has plainly stated in section 224(e)(1) that the telecom rate regulations "shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments." The Commission cannot find that the regulations explicitly prescribed by Congress to ensure rates are just and reasonable are not necessary to ensure the rates are just and reasonable. Such a finding would substitute the Commission's view of what is just and reasonable in lieu of Congress' stated view. This would not "forbear from applying" anything, but instead attempt to redefine the statutorily mandated parameters of a "just and reasonable" rate set forth in section 224(e). This goes beyond the purpose of forbearance, which should "say[] nothing as to what the statutory requirements are."[207] To forbear in this manner is simply a way for the Commission to

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[204] *See* 47 U.S.C. § 224(e)(1) ("The *Commission* shall....Such regulations *shall ensure that a utility* charges…"); § 224(e)(2) ("A *utility* shall apportion…"); § 224(e)(3) ("A *utility* shall apportion…"); § 224(f) ("A utility *shall provide* … any telecommunications carrier with…"); § 224(g) ("A *utility* that engages in the provision of telecommunications services or cable services *shall* impute…"); § 224(h) ("Whenever the owner of a pole…intends to modify or alter such pole…the *owner shall*…") (emphasis added throughout).

[205] Comments of Time Warner Cable, Inc., GN Docket No. 10-127, at 67 (July 15, 2010) ("Apart from these limitations on the Commission's ability to grant relief, forbearance is an odd fit for the present circumstances. Notably, forbearance does not make sense as a way of dealing with certain provisions of Title II, including those that impose rights rather than obligations.").

[206] 47 U.S.C. § 160(a)(1).

[207] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004).

accomplish indirectly what it could never accomplish directly, and is thus an unreasonable interpretation of the Act and the Commission's forbearance authority.[208] There is simply no authority given the Commission that transforms its forbearance authority to a broad ability to rewrite the statute.

D. The Florida IOUs Adopt and Incorporate their November 20, 2008 Submission on the USTA and AT&T/Verizon Rate Proposals

The FNPRM seeks comment on two separate rate proposals submitted by the United States Telecom Association ("USTA") and AT&T/Verizon.[209] The Florida IOUs submitted an ex parte letter specifically addressing these proposals on November 20, 2008, and adopt and incorporate the content of that letter as if fully set forth herein.[210] In short, the USTA proposal is a non-starter in all respects. Though the AT&T/Verizon proposal suffers from several legal and practical infirmities, it *could* serve as the starting point for developing a uniform rate for all section 224 broadband providers. In particular, the FNPRM asks: "is there a way in which the USTelecom or AT&T/Verizon proposals could be reconciled with the pole rental rate formulas specified in sections 224(d) and (e) of the Act?"[211] The answer to this question is "yes" – the AT&T/Verizon proposal *can* be reconciled with section 224(e) (so long as it applies only to section 224 broadband attachers). The Florida IOUs specifically explained how the Commission can accomplish this at pp. 4-6 of the November 20, 2008 letter.

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[208] *Ass'n of Communs. Enters. v. FCC*, 235 F.3d 662, 665-68 (D.C. Cir. 2001) (overturning as unreasonable the Commission's "circumvention of the statutory scheme" by defining "successor and assign" in such a way as to avoid a clear limitation on the Commission's forbearance authority").

[209] FNPRM, ¶ 119.

[210] Letter from Eric. B Langley and J. Russell Campbell to Marlene H. Dortch, WC Docket No. 07-245 (Nov. 20, 2008).

[211] FNPRM, ¶ 120.

E. There Is No Legal or Practical Justification For the Commission to Prolong its Consideration of ILEC Pole Attachment Rates

The FNPRM stated that "commenters should refresh the record regarding the questions raised regarding regulation of rates paid by incumbent LECs in the *Pole Attachment Notice* in the context of the issues under consideration here."[212] The Florida IOUs and other parties previously have explained the reasons that FCC regulation of ILEC attachments is neither legal nor necessary. Nothing has changed since the Florida IOUs and other electric utilities addressed this issue. For this reason, the Florida IOUs adopt and incorporate their past submissions on this issue as if fully set forth herein.[213]

Since the Pole Attachment Act was enacted in 1978, ILECs have been treated as pole *owners* rather than pole *attachers*. After the 1996 Amendment to the Act, the Commission stated:

> The 1996 Act ... *specifically excluded* [ILECs] from the definition of telecommunication carriers with rights as pole attachers. Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though *the ILEC has no rights under Section 224 with respect to the pole of other utilities*. This is consistent with Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.[214]

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[212] *Id.*, ¶ 143.

[213] Initial Comments of Florida Power & Light and Tampa Electric Regarding ILECs and Pole Attachment Rates, WC Docket No. 07-245 (Mar. 7, 2008), at 2-11; Reply Comments of Florida Power & Light, Tampa Electric, and Progress Energy Florida, WC Docket No. 07-245 (Apr. 22, 2008), at 14-19; Letter from Eric. B Langley and J. Russell Campbell to Marlene H. Dortch, WC Docket No. 07-245 (Nov. 20, 2008), at 1-3; *see also* Comments of Alabama Power, Georgia Power, and Mississippi Power, WC Docket No. 07-245 (Mar. 7, 2008), at 5-14; Reply Comments of Alabama Power, Georgia Power, and Mississippi Power, WC Docket No. 07-245 (Apr. 22, 2008), at 3-14.

[214] *In re Implementation of Section 703 (e) of the Telecommunications Act of 1996*, 13 FCC Rcd. 6777, 6781 (1998) (emphasis added).

This statement correctly describes the plain meaning of the statutory language – there is nothing to justify the Commission "revisit[ing] the issue of regulation of rates paid by incumbent LEC attachers."[215]

Even if the language in the Act, read in a vacuum, could support a reinterpretation by the Commission allowing ILECs to be treated as attachers, such a reading would violate the clear intent of the Act. Congress directed the 1996 Amendments to section 224 to "new entrants" into the telecommunications market.[216] ILECs by their very nature epitomize everything a "new entrant" is not – hence the not-so-subtle use of the descriptor "incumbent." The philosophical underpinning of section 224 has always been to protect against utility use of monopoly power to strong-arm artificially high rates out of attachers. ILECs, as the Commission acknowledges, are not like other attachers, in that they "generally attach to poles pursuant to joint use or joint ownership agreements" under which ILECs and electric utilities attach facilities to each other's poles or actually jointly own poles for the use of both. These agreements – many of which have existed in one form or another for more than 50 years – have negotiated terms based on a unique historical relationship not shared by the other attachers covered under section 224.[217]

If the Commission grants ILECs rights as section 224 attachers, it will spell the end of joint use agreements, which is ironic in at least two ways. First, it is because of joint use agreements that electric utilities have built networks of taller poles (often at least 35-40 foot poles). Without the ILECs sharing the cost of infrastructure through joint use agreements, electric utilities would have built networks with shorter poles, as there would be no need for

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[215] FNPRM, ¶ 143.

[216] *In re Implementation of Section 703 (e) of the Telecommunications Act of 1996*, 13 FCC Rcd. at 6802.

[217] FNPRM, ¶ 145.

allocated space (often 2-3 feet) or the Communication Workers Safety Zone (usually 40 inches). Second, the ILEC joint use agreements were the initial wedge for the Commission's pole attachment jurisdiction. For purposes of the Act, a "utility" includes only a utility "who owns or controls poles, ducts, conduits, or rights-of way *used, in whole or in part, for any wire communications.*"[218] The presence of ILEC attachments, enabled by decades-old joint use agreements, was the "wire communications" that gave the Commission its original jurisdiction. Moreover, if the Commission accepts the untenable proposition that ILECs are "provider[s] of telecommunication services" for purposes of section 224(a)(4), but not "telecommunication carriers" for purposes of section 224(f), then an electric utility would be able to *expel* an ILEC from its pole. This would most certainly undermine the Commission's goal of broadband deployment and competition.

Even setting aside the historical and legal differences between ILECs and other communications attachers, it cannot credibly be contended that regulating the financial consideration exchanged between ILECs and electric utilities will further broadband deployment. To the extent ILECs are pushing the broadband frontier, they are not doing it with attachments to new poles, but instead with new attachments to the *same* poles on which they already have copper, coax, fiber, or some combination of the three. Under most joint use agreements, the amount of consideration paid by the ILEC to the electric utility does *not* depend on the number of attachments. This is true for all of the Florida IOUs' joint use agreements with ILECs.[219] It does not matter whether an ILEC has four attachments and occupies six feet of space, or has only one attachment and occupies two feet of space – the ILEC pays the same rental rate (often called an "adjustment" rate to reflect the fact that the monetary consideration is designed to "adjust" the

[218] 47 USC § 224(a)(1) (emphasis added).

[219] Bowen Decl. at ¶ 4; Kennedy Decl. at ¶ 4; Cutshaw Decl. at ¶ 4.

relative costs of infrastructure ownership). The Commission's inquiry into this settled issue really just needs to end. If a change needs to be made (and it does not), it needs to be made in Congress.

IV. CONCLUSION

In a few places, the FNPRM moves pole attachment policy in the right direction, especially the Commission's recognition of the problems presented by unauthorized attachments, the Commission's efforts to reign-in the sign and sue rule, and the Commission's expressed desire to promote efficiency in dispute resolution. In many respects, though, the FNPRM creates more problems than it solves, for instance by instituting an access timeline that fails to address the real-world attachment permitting process, by expanding the remedies available to section 224 attachers, and by reinterpreting the telecom rate in a manner inconsistent with both the Act and the Commission's own precedent.

Many of the Commission's proposed rules address illusory problems that are not substantiated by the underlying record. The Commission proposes an access timeline in response to anecdotal evidence of make-ready delay, yet seems unwilling to act in response to a pandemic of unauthorized attachments. The Commission proposes to artificially deflate the telecom rate, despite any evidence from even a single CLEC that the telecom rate deterred it from broadband deployment. The Commission's proposed sweeping changes – all in the name of broadband deployment – are poorly calibrated to solve whatever real broadband access problems might exist. On the whole, the FNPRM appears to be a solution in search of a problem.

The Florida IOUs appreciate the opportunity to comment on the FNPRM, and look forward to continued involvement in this important proceeding.

Respectfully submitted,

/s/ Eric B. Langley
Eric B. Langley
Millicent W. Ronnlund
Balch & Bingham LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203

Counsel for the Florida IOUs

Exhibit A

DECLARATION OF SCOTT FREEBURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	WC Docket No. 07-245
	)	
Implementation of Section 224 of the Act;	)	GN Docket No. 09-51
A National Broadband Plan for Our Future	)	
	)	
	)	
	)	
	)	

DECLARATION OF SCOTT FREEBURN

1. My name is Scott Freeburn. I am currently employed at Progress Energy Florida, Inc. ("PEF") as Manager of Joint Use and Locates. I have held this position for 6 years. I am the same Scott Freeburn that submitted declarations in support of PEF's comments and reply comments in this docket in March and April 2008. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as Manager of Joint Use and Locates for PEF.

2. PEF, a subsidiary of Progress Energy, Inc., is an investor owned electric utility headquartered in St. Petersburg, Florida. PEF's service territory covers more than 20,000 square miles in 35 counties in Florida. Some of the major cities and areas within PEF's service territory include St. Petersburg, the north Orlando area, and Clearwater. PEF serves more than 1.7 million customers and owns approximately 1.1 million distribution poles. More than 510,000 of these poles are impacted by one or more third party attachments.

3. My declaration focuses on the access issues raised in the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced docket, as well as the Commission's

renewed inquiry into unauthorized attachments. I offer this testimony in support of the comments filed by PEF and the other four investor-owned electric utilities in Florida in response to the FNPRM.

4. PEF's major ILEC joint use partner is Verizon Florida, but PEF also has joint use agreements with CenturyLink and AT&T. To my knowledge, each of these ILECs offers broadband service in all areas where it has attachments to PEF poles. PEF has pole license agreements with numerous cable operators and CLECs. PEF's major cable television attachers are Bright House Networks, Comcast, and Mediacom. PEF's major CLEC attachers are Knology, Sunesys, and Orlando Telephone. PEF's single largest non-ILEC attacher is Bright House Networks, which has approximately 302,500 attachments on PEF's system. To my knowledge, all of the above listed attachers offer broadband services over their attachments to PEF poles. Most parts of PEF's service territory are served by at least two broadband providers.

5. PEF has approximately 4,000 attachments on its poles that are not ILEC, not cable television and not CLEC (or any other telecom). Approximately 2,500 of these are governmental attachments and 1,500 of these attachments are owned by private entities.

6. PEF's pole license agreements limit the number of new applications from any entity to 500 attachments per 45-day period. These limits are designed to prevent engineering and make-ready logjams. No attaching entity has ever voiced a complaint to PEF about these limitations.

7. PEF currently uses a permitting contractor, IJUS, which also performs required clearance and duel loading analysis. We have a Joint Use Guidelines Manual posted on the web for all communications companies. This manual includes permitting requirements, operations expectations and specific standards for attaching to PEF poles.

8. Many factors can delay the attachment application process, including county and city permitting issues, labor strikes, availability of materials, existing work load and weather. If a make-ready job involves construction work by PEF, the work order is placed in a queue with other work orders, and worked in order of its queue position. The number and complexity of other work orders in the queue varies from time to time. Sometimes a construction job might be delayed because it requires a material PEF does not have in inventory. For example, if the job requires a height and class of pole that is not stocked in PEF's inventory, the lead time for acquiring the necessary pole is typically 120 days.

9. During the 2004 hurricane season, PEF's service territory was directly impacted by 4 hurricanes (Jeanne, Frances, Charley and Ivan) during a period of 7 weeks. It took approximately 10-12 weeks to get operations back to normal functions. During this time period, PEF stopped taking new permit applications and focused on restoration needs.

10. PEF is a member of the Southeastern Electric Exchange ("SEE"). One of the principal purposes of SEE is mutual assistance, an arrangement under which PEF will send crews to assist other member utilities in emergency situations or during massive outages. Even though Hurricane Katrina's impact to PEF's service territory was mild, PEF sent crews to Mississippi and Louisiana to assist in the recovery under the SEE mutual assistance arrangement. This diverted crews for several months, leaving PEF temporarily shorthanded.

11. PEF has worked with several WiFi and Distributed Antenna System ("DAS") companies on agreements for wireless antenna attachments in both the communications space and on pole tops within the past couple of years. I have seen at least four different types of antenna within the past year alone. When a company proposes a new type of attachment, PEF requires the company to submit a prototype of the equipment for engineering review and approval. This has

led to the creation of new construction standards on several occasions in order to accommodate this atypical equipment. The standards not only involve the construction on the pole itself, but also associated equipment. For example, PEF's DAS specifications involve pad mounting power supply and other associated equipment on a separate pedestal in the right-of-way.

12. PEF owns some distribution poles in Gilchrist, Hamilton, and Lafayette Counties, but these counties are primarily served by electric cooperatives and municipally-owned electric systems.

13. PEF typically avoids moving or transferring communications attachments, unless absolutely necessary. Moving communications attachments requires a skill set different than the skill set possessed by our electric crews. PEF actually tried a broad-based transfer program a number of years ago (with the hope of improving efficiency for all parties), but the communications companies were never satisfied with how the work was performed.

14. PEF's pole attachment agreements require, upon discovery of unauthorized attachments, payments of back rent, plus interest, and a $25 fee for each unauthorized attachment in excess of 2% of the last verified total number of attachments. After an audit in 2006, PEF sent invoices to various attachers for unauthorized attachment fees. One of PEF's attachers objected to paying the invoice on grounds (among others) that the unauthorized attachment provision in the pole attachment agreement was unenforceable under the Commission's precedent. This attacher also contended that the contractual interest rate provision (applicable to back rent) was unenforceable based on the Commission's precedent. In order to avoid litigation in competing forums (state court and the FCC), PEF settled the dispute for an amount less than the full invoice.

15. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 13th day of August, 2010.

Scott Freeburn
Manager - Joint Use and Locates
Progress Energy Florida

Exhibit B

DECLARATION OF MARK CUTSHAW

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	WC Docket No. 07-245
	)	
Implementation of Section 224 of the Act;	)	GN Docket No. 09-51
A National Broadband Plan for Our Future	)	
	)	
	)	
	)	

DECLARATION OF MARK CUTSHAW

1. My name is Mark Cutshaw. I am currently employed by Florida Public Utilities ("FPU") as General Manager. My responsibilities include, but are not limited to, managing FPU's joint use and pole attachment agreements. I have held this position for 19 years, and have worked for FPU for 19 years. I have 28 total years of experience in the electric industry.

2. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as General Manager for FPU. I offer this testimony in support of the comments filed by FPU and the other four investor-owned electric utilities in Florida in response to the FNPRM.

3. FPU, a wholly owned subsidiary of Chesapeake Utilities Corporation, is an investor owned electric and natural gas utility with Florida operations headquartered in West Palm Beach, Florida. FPU's electric operations are based in Northeast Florida (Fernandina Beach) and Northwest Florida (Marianna). FPU serves 30,916 electric customers in 4 counties, and its electric service territory covers approximately 335 square miles. FPU owns approximately 28,000 distribution poles, which collectively host approximately 14,000 third party attachments.

4. FPU has joint use agreements with CenturyLink, AT&T, and GTC. Each of these ILECs, to my knowledge, offers broadband service over its attachment to FPU poles. FPU's joint use agreements with the ILECs involve a per pole – versus per attachment – rental fee. In other words, each party pays the other the same rental rate regardless of the number of attachments or amount of space occupied.

5. FPU has pole attachment agreements with Comcast, Time Warner Cable and two CLECs. To my knowledge, each of these four entities offers broadband service over its attachments to FPU poles.

6. FPU maintains information about distribution pole locations through a Geographic Information System ("GIS"). The information FPU maintains on this system, which primarily relates to geospatial positioning and local electric facilities is the information we need for our core business purposes.

7. FPU uses the National Joint Utilities Notification System ("NJUNS") for transfer and removal notices, and requires its attachers to use NJUNS as well. Though FPU handles its own permit processing, we do not participate in communications space make-ready work on our poles. All such work is handled by the communications companies or their contractors in coordination with each other.

8. FPU is a member of the Southeastern Electric Exchange ("SEE"). One of the principal purposes of SEE is mutual assistance – coming to the aid of a member utility in emergency situations or during massive outages. After Hurricane Katrina (which minimally impacted FPU's electric service territories) FPU sent crews to Louisiana to assist in the recovery under the SEE mutual assistance arrangement. During the 2004-2005 storm season, there were occasions when it took three weeks to return to normal operations after a storm.

9. FPU owns some distribution poles in and serves parts of Calhoun and Liberty Counties, but these counties are primarily served by electric cooperatives and municipally owned electric systems.

10. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 15th day of August, 2010.

Mark Cutshaw
General Manager
Florida Public Utilities Company

Exhibit C

DECLARATION OF
THOMAS J. KENNEDY, P.E.

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	WC Docket No. 07-245
	)	
Implementation of Section 224 of the Act;	)	GN Docket No. 09-51
A National Broadband Plan for Our Future	)	
	)	
	)	
	)	

DECLARATION OF THOMAS J. KENNEDY, P.E.

1. My name is Thomas J. Kennedy. I am a Professional Engineer licensed in the State of Florida. I am currently employed by Florida Power & Light Company ("FPL") as Principal Regulatory Affairs Analyst in the Distribution Business Unit. I am FPL's Professional Engineer responsible for managing Joint Use. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity at FPL. I am the same Thomas J. Kennedy who submitted declarations in support of FPL's comments and reply comments in this docket in March and April 2008.

2. FPL is an investor owned electric utility with its principal offices in Juno Beach, Florida. FPL's service territory contains approximately 27,650 square miles, covering the entire east coast of Florida, as well as certain parts of Florida's west coast south of Tampa. Major cities within FPL's service territory include Miami, Miami Beach, Ft. Lauderdale, Boca Raton, West Palm Beach, Daytona Beach, Sarasota and Naples. FPL serves approximately 4.5 million customers in 35 counties, and owns more than l.l million distribution poles. More than 790,000

of these poles are impacted by third party attachments. FPL's overhead system contains more than 42,000 miles of line.

3. My declaration focuses on the access issues raised in the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced docket. I offer this testimony in support of the comments filed by FPL and the other four investor-owned electric utilities in Florida in response to the FNPRM.

4. FPL has joint use agreements with six (6) Incumbent Local Exchange Carriers ("ILECs"). All of these ILECs offer broadband service and, to the best of my knowledge, all offer broadband services over their attachments to FPL poles. All of FPL's joint use agreements are structured such that rental (adjustment) payments are made on a per pole, rather than per attachment, basis. Though the joint use agreements contain space allocations to each party, the rental payments do not vary based on space occupied or the number of attachments.

5. FPL has pole attachment agreements with numerous cable operators and non-incumbent telecommunications carriers. FPL's largest cable attacher has over 518,000 attachments. FPL's largest Competitive Local Exchange Carrier ("CLEC") attacher to distribution poles has more than 9,700 attachments. Both of these companies offer broadband services in portions of their service areas that overlap with FPL's service area. To my knowledge, almost every other cable operator and telecom carrier with whom FPL has pole attachment agreements also offers broadband services in the portions of their service areas that overlap with FPL.

6. Additional attachments on FPL's poles belong to entities other than cable television systems and telecommunications carriers. FPL has more than 10,000 governmental attachments (*e.g.* traffic control, traffic signals, essential services, Wi-Fi attachments, public works automated metering equipment, public radio and television communication cable, school networks,

surveillance cameras, community plaques) on its distribution poles, and more during certain seasons (banners, decorations, etc.).

7. There are also substantial wireless broadband networks in FPL's service territory. FPL has wireless antenna attachment agreements with six (6) different telecommunications carriers for attachments to distribution poles and has Wi-Fi antenna attachment agreements with seven (7) different entities. The wireless equipment proposed by attachers and attached to FPL poles varies considerably in dimension, where they want to place it on a pole, how much of the pole (both in height and circumference) it covers and loading profile. In the past two years, FPL has reviewed at least six different types of wireless antenna, each with unique safety, work method and reliability implications. A new device or configuration may also require FPL to develop a new overhead distribution construction or work method specification (*e.g.* a two foot tall antenna that surrounds the entire pole would mean it could only be installed on poles FPL was willing to surrender climbing capability). When FPL receives a request for a new type of antenna, FPL requests design plans, specifications, and an actual working device for analysis. Alternatively, at the choice of the antenna attacher, FPL will provide the requesting attacher the opportunity to install its equipment on a mock pole at FPL's test facility. If FPL approves the device for installation on FPL poles, FPL sends the attacher an "approved" form to be included with each permit application submitted by the attacher to FPL (in order to speed the permitting process). I have yet to see a telecommunications carrier antenna that was identical from one carrier to the next.

8. FPL does not currently have specific limitations on the number of poles/permits/attachments for a given period. However, FPL does request advance notice of large projects. Upon receipt of such notice, FPL will provide the applicant instruction on

segmenting its project into manageable sections for purposes of efficient permit application processing.

9. The key to timely completion of a project is proper planning by the applicant. If an applicant carefully chooses its route (the path of least resistance), it can often completely avoid costly and time-consuming make-ready. The vast majority of the time frame during which a project can be completed lies exclusively within the control of the attacher or other third-party attachers.

10. FPL uses a permitting contractor, Alpine Communication Corp., to administer its pole attachment permit process for third party attachments. FPL and Alpine have a detailed permit process manual that explains the requirements of an application package, and the step-by-step permit process.

11. Many factors can impact the time it takes to complete the attachment process, especially major storms and hurricanes which can strain FPL's resources, including but not limited to line crews, material and support personnel. After Hurricane Wilma (2005), it took FPL 4-6 months to complete most distribution follow-up work and some of the work took as long as 12 months to complete. Additionally, major storms that impact the United States can affect FPL's resources even if FPL's service territory is not directly impacted. FPL is a member of the Southeastern Electric Exchange ("SEE"). One of the principal purposes of SEE is mutual assistance – coming to the aid of a member utility in emergency situations or during massive outages. For example in 2005, Hurricane Katrina impacted FPL's service area. After service was restored, FPL sent construction crews and support personnel to Louisiana to assist in their recovery and not much later that summer FPL sent construction crews and support personnel to Texas to assist with the

restoration efforts associated with the destruction caused by Hurricane Rita, both under the SEE mutual assistance arrangement.

12. After FPL grants an attachment application, FPL does not perform communications make-ready work in the communications space. Existing attachers usually rearrange or remove their own attachments, or reach some other agreement with the prospective attacher to do so. After FPL completes its make ready work, FPL is not involved with the attachment of communication lines. This is handled by the attacher or its contractor. FPL or its contractor does post-inspect the attachment, to ensure it has been done correctly, but the only instance (after the performance of its make ready work) that FPL will intervene is if it acquires actual knowledge of some dangerous or unauthorized practice.

13. In March of 2009 a contractor installing a broadband WiFi antenna on FPL's facilities in the city of Hollywood, Florida made contact with FPL's open wire when his uncovered (no hard hat) head contacted the wire above him. The contractor collapsed, immediately falling to the bottom of the bucket. FPL and OSHA arrived at the site simultaneously and both shut the contractor down. OSHA cited the contractor for not observing safety rules, the employee not wearing his safety equipment and the bucket truck not being insulated or grounded.

14. To the extent FPL has agreed to a make-ready project that requires construction activity by FPL, the requesting entity pays the "Lump-Sum" cost of such activity, including materials and labor, up-front. FPL moved to this practice in the early 1990s, and, in my experience, this practice is typical for the industry. It is also consistent with FPL's processes and practices utilized with electric customers and other entities per Florida Public Service Commission rules, approved tariffs and agreements. For example, if a pole needs to be relocated because a customer is building a turn lane, or if a service drop needs to be relocated because a customer is

installing a pool, full payment is made up-front before material is procured or any stage (*e.g.* applying for governmental work permits) of construction is initiated.

15. FPL make-ready work is priced based on the specific tasks, materials and equipment required for the specific location. Prices can vary depending on countless unique factors, including: the types of equipment required to perform the work, the location of the pole (front lot vs. rear lot), the agency permitting requirements (*i.e.* time of day, weekend or seasonal restrictions), agency permitting costs, potential environmental issues, necessary switching, site conditions, and any necessary tree trim. The ultimate price of make-ready is unique to each attachment application for these reasons.

16. Certain construction jobs, including some make-ready projects, require scheduled outages. In FPL's territory, the majority of hospitals requires advance notification and scheduled outages during their off-peak hours. In fact, two years ago FPL installed a generator onsite at a major Miami hospital because an outage was taking longer than they could work with.

17. FPL endeavors to accommodate expedited attachment requests, where feasible. A telecommunications carrier presented FPL and its pole attachment permit contractor with a request for expedited make ready in order to provide this third party attacher with proper vertical clearance over a federal interstate highway. The permit application, contractor engineering, telecommunications carrier payment and FPL construction were all expedited and through cooperation of all parties the requested (very short) time frame was met. The vertical clearance was needed by February 1, 2008. The teamwork required to achieve this occurred as follows:

a. Applicant sent permit application package to FPL: January 4, 2008

b. Invoice sent to applicant for make ready: January 7, 2008

c. Applicant paid make ready invoice: January 19, 2008

d. FPL completed the make ready construction: January 31, 2008

18. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 16th day of August, 2010.

Thomas J. Kennedy
Principal Regulatory Affairs Analyst
Florida Power & Light Company

Exhibit D

DECLARATION OF
ERIC L. O'BRIEN

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	WC Docket No. 07-245
	)	
Implementation of Section 224 of the Act;	)	GN Docket No. 09-51
A National Broadband Plan for Our Future	)	
	)	
	)	
	)	

DECLARATION OF ERIC L. O'BRIEN

1. My name is Eric L. O'Brien. I am currently employed at Tampa Electric Company ("TECO"), as Administrator, Joint Use Contracts. My primary responsibilities as Administrator, Joint Use Contracts are supervising TECO's Joint Use Department and managing TECO's relationship with third-party attachers. I have held this specific position for almost two years, and have worked in TECO's joint use department for approximately four years. I have been employed by TECO in various positions, including as a Field Engineer, since 2003. There are currently four full time employees at TECO dedicated solely to joint use and third party attachments, and countless others (including my manager, accounts receivable department, plant accounting, regulatory, permitting department and planning and scheduling, to name a few) who devote substantial time to joint use and pole attachment matters. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as Joint Use Supervisor for TECO.

2. TECO is an investor owned electric utility headquartered in Tampa, Florida and has supplied the Tampa Bay area with electricity since 1899. TECO's service area covers 2,000 square miles, including all of Hillsborough County and parts of Polk, Pasco and Pinellas

counties. TECO serves nearly 670,000 residential, commercial and industrial customers. TECO has approximately 307,000 distribution poles, more than 204,000 of which are impacted by third party attachments TECO's service territory is dense and relatively small. It takes less than two hours to drive from one end of our service territory to the other.

3. My declaration focuses on the access issues raised in the Commissions' Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced docket. I offer this testimony in support of the comments filed by TECO and the other four investor-owned electric utilities in Florida in response to the FNPRM.

4. TECO has joint use agreements with Verizon and Embarq (now called CenturyLink). Verizon is by far the dominant ILEC in TECO's service territory and, to my knowledge offers broadband service in all areas of its service area that overlap with TECO's service area. TECO also has pole attachment agreements with several cable operators and CLECs, including Bright House Networks, Time Warner Telecom, Knology and Comcast. Bright House is TECO's largest non-ILEC attacher, with more than 186,000 attachments.

5. TECO's pole attachment agreements require that counterparties subscribe to, and use, the National Joint Utilities Notification System ("NJUNS"). The contracts provide:

> Tampa Electric will submit written requests for removal of equipment to Licensee via the National Joint Use Notification System (NJUNS), which is a web-based electronic notification system that may be accessed through the internet. Licensee shall obtain a membership code through NJUNS, and shall maintain adequately trained personnel to manage correspondence transactions with Tampa Electric.

NJUNS is a useful tool for communication requests for removal and transfer, and can also be used in conjunction with other web-based system management software, such as SpidaWeb (discussed herein). I am one of two NJUNS Board of Directors for the state of Florida, and have served on the board for 2 years.

6. Many attachments on TECO's poles belong to entities other than cable television systems and telecommunications carriers. TECO has more than 11,000 governmental attachments on its distribution poles.

7. In addition to NJUNS, TECO also uses SpidaWeb, which is a web-based pole attachment application and make-ready management platform. TECO has been using SpidaWeb since 2008. The SpidaWeb system uses existing TECO data, as well as data collected through recurring, detailed, time consuming and costly audits. The SpidaWeb system presents an approximation of TECO's as-built system of distribution poles, and includes digital photographs, (as well as Google Street View, where available) of each pole. This allows third-party attachers to preview potential routes for preliminary route selection purposes. SpidaWeb also accommodates on-line submission of pole attachment applications. However, all applications require a field check before processing, because the data available through SpidaWeb may be inaccurate due to the ever changing environment of the electrical distribution pole system. TECO does not need the level/type of data maintained and made available through SpidaWeb for its core business purposes.

8. TECO's pole license agreements limit attachers to 10 applications per 30-day period, covering no more than 120 poles. The vast majority of pole attachment applications are nowhere near these limits. Limitations help TECO to manage the worst case scenario while providing predictability (for project planning and staffing purposes) to attachers. The main purpose of these limitations is to prevent engineering and make-ready logjams. To my knowledge, no attaching entity has ever voiced a complaint to TECO about these limitations. The key to a seamless make-ready project is advance notice and proper planning, both of which are very easy to accomplish through TECO's permitting process.

9. Since 2003 TECO has used a permitting contractor to process permits. The current permitting contractor is IJUS, LLC, which is affiliated with the SpidaWeb software platform. IJUS also handles permit engineering in order to provide a one-stop shop for third-party attachers. Using a permitting contractor also helps TECO balance the demands of attachers with its own operational requirements.

10. Many factors can influence the time it takes to complete a make ready job. For instance, The City of Tampa requires a permit any time TECO breaks the ground in the city's right-of-way. The average time it takes to work through this permitting process is 4-8 weeks. Weather can also cause delays, even if the weather event does not directly impact TECO's service territory. During storm season (June through November) the Tampa Bay area experiences many lightning strikes that require line personnel to work on restoration instead of normal business. Nearly 50 lightning bolts strike each square mile of Tampa Bay annually. TECO is a member of the Southeastern Electric Exchange ("SEE"). One of the principal purposes of SEE is mutual assistance – coming to the aid of a member utility in emergency situations or during massive outages. After Hurricane Katrina (2005), TECO sent crews to Mississippi and Louisiana to assist in the recovery under the SEE mutual assistance arrangement. TECO had crews deployed to other utilities for 6-8 weeks. After Hurricane Rita (2005), TECO sent crews to Texas to assist in the recovery under the SEE mutual assistance arrangement. TECO had crews deployed to other utilities for 4 weeks.

11. TECO does not perform make-ready work regarding third-party attachments already on the pole. There are a number of reasons TECO does not perform this work, including contractual prohibitions and union contracts with attachers. Existing attachers usually rearrange or remove their own attachments, or reach some other agreement with the prospective attacher (itself or its

contractor) to do so. TECO is almost never involved in the actual post-make-ready attachment of lines. This is handled by the attacher or its contractor. TECO or its contractor will post-inspect the attachment, to ensure it has been done correctly, but the only time TECO will intervene in the post-make-ready attachment of lines is if it acquires actual knowledge of some dangerous or unauthorized practice. For example, in June 2010, we had to shut down an attacher's contractor because the contractor was working in the bucket of an uninsulated bucket truck without a hard hat, and with his head less than one-foot from the bottom hot leg of our open wire secondary.

12. When TECO agrees to perform make-ready involving electric facilities (rearrangement or change-out) the requesting entity pays the cost of such activity, including materials and labor, up-front. This is consistent with other types of construction.

13. Every entity for whom TECO performs construction work, with the exception of governmental entities (limited to road widening), pays up-front. The most common example of this is when a customer wants to convert from an overhead to underground service line. The customer must pay TECO prior to any work being done, including engineering work.

14. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 13th day of August, 2010.

Eric L. O'Brien
Joint Use Supervisor
Tampa Electric Company

Exhibit E

DECLARATION OF
BEN A. BOWEN

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	WC Docket No. 07-245
	)	
Implementation of Section 224 of the Act;	)	GN Docket No. 09-51
A National Broadband Plan for Our Future	)	
	)	
	)	
	)	
	)	

DECLARATION OF BEN A. BOWEN

1. My name is Ben A. Bowen. I am currently employed at Gulf Power Company ("Gulf") as a Senior Project Services Specialist. My primary job responsibility is administering Gulf's joint use program at the corporate level. I have served in my current capacity since 1995 and have been with the company for approximately 23 years. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as joint use administrator for Gulf. I am the same Ben Bowen who submitted a declaration in support of comments filed by Alabama Power, Georgia Power, Gulf Power and Mississippi Power in this docket in March 2008.

2. Gulf, which is a subsidiary of Southern Company, is an investor-owned electric utility headquartered in Pensacola, Florida. Gulf's service territory covers 7,400 square miles in 71 towns and communities in northwest Florida. Some of the major cities and areas in Gulf's service territory are Pensacola, Ft. Walton Beach, Destin and Panama City. Gulf serves 428,154 customers in 10 counties and owns 251,099 distribution poles. Of these poles, at least 150,723 are impacted by third party attachments.

3. My declaration focuses on the access issues raised in the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced docket, as well as the Commission's proposed revisions to the "sign and sue" rule, and the Commission's renewed inquiry into unauthorized attachments. I offer this testimony in support of the comments filed by Gulf and the four other investor-owned electric utilities in Florida in response to the FNPRM.

4. Gulf has three joint use agreements with ILECs in its service area (AT&T, CenturyLink, and Fairpoint Communications). To my knowledge, each of these ILECs offers broadband services throughout most, if not all, of its overlapping service areas with Gulf. Under Gulf's joint use agreements, the parties pay each other a per pole (not a per attachment) rate. The parties pay the same rate regardless of how many attachments they have, or how much space they occupy.

5. Gulf also has multiple pole license agreements with cable television operators throughout its service territory. The main cable operators are Cox Communications, Comcast, Bright House Networks and Mediacom. To my knowledge, each of these companies offers broadband service in all of its overlapping service areas with Gulf. Gulf also has pole license agreements with several CLECs who already have deployed or have expressed intent to deploy fiber networks within parts of Gulf's service territory. The main CLECs with whom Gulf has pole license agreements are Knology, Southern Light, and Kentucky Data Link.

6. In addition to the attachments by ILECs, cable operators and CLECs, Gulf's poles also have attachments from governmental entities and other types of attachers. Gulf poles currently have 1,472 governmental attachments and 221 attachments by other entities.

7. For the past couple of years, Gulf has used a permitting contractor to process permit applications and perform pre-attachment field checks and pole loading documentation. The

current contractor is ICON, Inc. Gulf has a permit process manual which lays-out detailed instructions for the permit application process. The use of a permitting contractor has improved the efficiency of the permitting process. Gulf's attachers can, and often do, retain the services of Gulf's permitting contractor to conduct the necessary pre-attachment field surveys. This helps ensure that applications are submitted in the proper form and with the proper content.

8. The attacher and Gulf's permitting contractor will typically work together to avoid costly and time-consuming make-ready. This may involve alternate route selection, underground burial or some combination of the two. Gulf's permitting contractor has access to Gulf's DistGIS system, which is an electronic model of Gulf's distribution system overlayed on a representation of the land base. DistGIS maps the location of distribution facilities and interfaces with Gulf's Trouble Call and customer service systems, but does not track as-built data on each pole. The information maintained in DistGIS is the information Gulf needs for its core business purposes. Gulf has not received complaints from its attachers regarding the sufficiency of this information as applied in the permitting and make-ready process.

9. When Gulf agrees to a make-ready project that requires construction activity by Gulf (for example a supply space rearrangement or pole change out), the requesting entity pays the cost of such activity up-front, including materials and labor. This has been the practice as long as I have worked for Gulf, and, in my experience, is typical for the industry. Every entity for which Gulf performs construction work, with the possible exception of governmental entities, pays up-front.

10. After Gulf has granted an attachment application, Gulf does not perform any make-ready work regarding third-party attachments already on the pole. Existing attachers usually rearrange or remove their own attachments, or reach some other agreement with the prospective attacher to do so. Gulf is almost never involved in the actual post-make-ready attachment of lines. This is

handled by the attacher or its contractor. We post-inspect the attachment, to ensure it has been done correctly. The only time Gulf will intervene in the post-make-ready attachment of lines is if it acquires actual knowledge of a dangerous or unauthorized practice.

11. Gulf recently concluded negotiations for new pole attachment agreements with all cable operators in its service territory. The negotiations lasted approximately 12 months, and included the exchange of multiple draft agreements, numerous pieces of correspondence, three face-to-face meetings between the negotiation teams, and countless verbal exchanges. At various points in the negotiation, both sides raised objections to language proposals and ideas suggested by the other. There was, from Gulf's perspective, significant give and take by both sides during the negotiation. Gulf invested significant effort in this negotiation in order to obtain a good contract that worked for all parties.

12. A 2006 system audit of Gulf's system revealed substantial unauthorized attachments by one of Gulf's cable television attachers. The contracts in place at that time required payments of back rent (plus interest) and a $25 fee for each unauthorized attachment in excess of 2% of the last verified total number of attachments. When Gulf invoiced the cable attacher for unauthorized attachments as set forth in the pole license agreement, the attacher objected on grounds that the contractual provision would be held "unjust and unreasonable" by the Commission. For this reason, along with other economic reasons, Gulf ultimately settled the matter for an amount less than the actual invoice.

13. Gulf's pole license agreements require attaching entities to participate in the National Joint Utilities Notification System ("NJUNS").

> The parties recognize that improved coordination of activities under this Agreement is of benefit to all parties, and that Licensee's and Gulf's participation in the National Joint Utilities Notification System ("NJUNS"), a Web-based system developed for the purpose of improving the coordination of such activities,

> would improve their respective operations under this Agreement. Licensee will join NJUNS within 30 days of the execution of this Agreement (if it has not already) and, during the term of this Agreement or as long as Licensee has Attachments on Gulf's poles, will actively participate by entering field information into the NJUNS system within the times required by the system....

NJUNS streamlines the transfer of attachments. I currently sit on the NJUNS Board of Directors, and have done so for 6 years.

14. The most destructive storm to Gulf's service territory in the past 10 years was Hurricane Ivan in September 2004. It took Gulf 13 days to restore power to those customers who could receive service and substantially longer to fully repair the damage to the system. Even when Gulf's service territory is not directly impacted by a storm, it can impact Gulf's operations. Gulf is a member of the Southeastern Electric Exchange ("SEE"). One of the principal purposes of SEE is mutual assistance – coming to the aid of a member utility during emergencies or massive outages. For example, even though Hurricane Katrina's impact to Gulf's service territory was mild, Gulf sent crews to Mississippi to assist in the recovery under the SEE mutual assistance arrangement. This can impact crew and other personnel resources in a significant way for a period of weeks.

15. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 11th day of August 2010.

Ben A. Bowen

Ben A. Bowen
Senior Project Services Specialist
Gulf Power Company

Exhibit F

COMMISSION BRIEF IN OPPOSITION TO CERT

No. 02-1474

IN THE SUPREME COURT OF THE UNITED STATES

ALABAMA POWER COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

PAUL D. CLEMENT
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN A. ROGOVIN
General Counsel

JOHN E. INGLE
Deputy Associate General Counsel

GREGORY M. CHRISTOPHER
Counsel

Federal Communications Commission
Washington, D.C. 20554

4. Petitioner contends (Pet. 13) that "the court of appeals inappropriately applied rate regulation principles to a physical takings case." The court of appeals, however, clearly decided this case on the premise that it involved a physical taking and that the just compensation analysis applicable in such cases is different from the analysis applicable to a rate regulation case not involving a physical taking. The court stated that "[t]he FCC inappropriately focused on ratemaking cases" and explained that "[w]hen a physical taking is at issue, * * * a different analytical hat must be worn." Pet. App. 15a.[4]

Petitioner also argues (Pet. 15-16) that "[t]he most glaring example of the court of appeals' own ratemaking analysis is its * * * conclusion that the disparate rates for the taking of identical pole space (i.e., the Cable Rate vs. the Telecom Rate) is 'irrelevant' due to Congress' 'legislative discretion.'" Petitioner's argument rests upon a misunderstanding of the Just

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[4] For that reason, petitioner's complaint that the court of appeals approved a "historical cost measure" in this case is mistaken. The statutory formula compensates petitioner at actual, present value for the incremental costs associated with cable attachments. See, e.g., In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments, 16 F.C.C.R. 12103, at n. 120 (2001) (utilities may recover "up front," i.e., in advance, "the full amount of make-ready or pole change out costs"). The statutory formula does use historical costs to measure the additional amount, over incremental costs, that petitioner receives for its proportionate share of the pole space used by the cable attachment. But the court of appeals did not rely on that use of historical costs. Instead, the court held that the statutory rate provides just compensation because it undoubtedly yields "much more than marginal cost," Pet. App. 21a, thus making it of no significance whether the "much more than marginal cost" amount is derived using historical costs, present value, or some other methodology.

Compensation Clause. The Clause sets a minimum -- not a maximum -- amount that the government must pay when it effects a taking of a property right. Because the rate for cable television attachments satisfies the constitutional minimum of "just compensation," Congress's determination that other pole attachers should pay a higher rate is indeed irrelevant. See Pet. App. 21a n.23.[5] The court's observation that it is irrelevant that different attachers pay different rates demonstrates that the court was focused on the proper just compensation analysis.

4. a. Petitioner contends (Pet. 17) that the court of appeals erred because it "abandoned the hypothetical willing buyer/willing seller standard, instead requiring that [petitioner] prove the existence of an actual buyer 'waiting in the wings' before it can claim that its property has any value." Ibid. That contention, too, is mistaken.

Initially, the court of appeals did not hold that a plaintiff

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[5] Petitioner argues (Pet. 16) that the higher Telecom Rate demonstrates "immediate, identifiable and rivalrous 'lost opportunity.'" See Pet. 25 ("Once a cable company attaches * * *, [petitioner's] limited communications space is lost (on average)."). That would be true only if petitioner were forced to permit a cable television system to use up pole space that could otherwise have been provided to another entity, such as a telecommunications service provider, at a higher price. Although petitioner now argues (Pet. 24-25) that its poles are crowded, its calculations are inconsistent with the FCC's presumptions regarding pole height and usable space, see Pet. App. 73a-74a; as the Commission noted, although those presumptions are rebuttable, id. at 73a, petitioner did "not provide[] data that would overcome" them. Id. at 73a, 74a. Indeed, petitioner did not make the showing that any of its poles is crowded. See Pet. App. 20a ("[N]owhere in the record did [petitioner] allege that [its] network of poles is currently crowded."). Accordingly, it is too late for petitioner to make arguments in this Court based on an alleged lost opportunity cost.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JOHN A. ROGOVIN
General Counsel

PAUL D. CLEMENT
Deputy Solicitor General

JOHN E. INGLE
Deputy Associate General Counsel

JAMES A. FELDMAN
Assistant to the Solicitor General

GREGORY M. CHRISTOPHER
Counsel
Federal Communications Commission

JULY 2003